IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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BP PIPELINES INC., *Petitioner*,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioner, BP Pipelines Inc. (BP), respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 29, 1977.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 557 F.2d 775 (5th Cir. 1977) and appears in the Appendix hereto (App. A). The order of the Interstate Commerce Commission (ICC), In-

vestigation and Suspension Docket No. 9164 (Rate Filings) and No. 36611 (Rules and Regulations), June 28, 1977, which was the subject of the Fifth Circuit's review, also appears in the Appendix hereto (App. B). The order of the ICC denying reconsideration of its Order of suspension is set out in Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on July 29, 1977. A timely Petition for Rehearing was denied on September 8, 1977, and this Petition for Writ of Certiorari has been filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and § 2350(a).

QUESTIONS PRESENTED

(1) Does Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), authorize the ICC to prevent the institution of service, for up to seven months, of a potential interstate oil pipeline common carrier by suspending the initial proposed rates of such carrier, thus abrogating the recognized right of a crude oil pipeline carrier to establish its rates and operating practices in the first instance?

(2) Can the ICC prescribe an interim rate for BP without benefit of a hearing where Section 15(1) of the Interstate Commerce Act, 49 U.S.C. § 15(1), specifically provides that the Commission may only prescribe a rate after a "full hearing"?

(3) Can the ICC properly impose a refund condition on BP's originally filed rate of $6.35 and on BP's Commission-prescribed interim rate of $4.68 where neither rate was an increase over an existing rate and

where Secton 15(7) of the Interstate Commerce Act only authorizes the Commission to attach refund conditions to "increased" rates?

(4) Can the ICC impose a refund condition on BP's Commission-prescribed rate of $4.68 where (a) Section 15(1) of the Interstate Commerce Act only authorizes the Commission to set rates which are reasonable, and (b) this Court has held, in *Arizona Grocery Co.* v. *Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932), that reparations are not permitted if the Commission subsequently prescribes a lower rate?

STATUTORY PROVISIONS INVOLVED

Federal Power Act, 16 U.S.C. § 824d.

Interstate Commerce Act, 49 U.S.C. § 1, § 8, and §§ 15 (1) and (7).

Natural Gas Act, 15 U.S.C. § 717c(e).

(The above-cited provisions are set out verbatim in the Statutory Appendix hereto).

STATEMENT OF THE CASE

BP is a corporation organized and existing under the laws of the State of Delaware with its principal offices at 255 California Street, San Francisco, California 94111. BP owns a 15.84% undivided interest in the Trans-Alaska Pipeline System (TAPS). Seven other companies own undivided interests in TAPS.

TAPS consists of a 48-inch crude oil pipeline, running approximately 800 miles from Prudhoe Bay to the ice-free port of Valdez on Alaska's southern coast, and a tank farm and marine terminal at Valdez.

The Trans-Alaska Pipeline Authorization Act, 43 U.S.C. §§ 1651 *et seq.*, declared that the pipeline should be constructed as expeditiously as possible in order to facilitate the earliest possible delivery of North Slope crude to the American consumer and to promote the national interest. Construction was completed in June, 1977 and the pipeline was available for transportation on July 31, 1977.

BP is utilizing its share of TAPS as an independent common carrier subject to the provisions of the Interstate Commerce Act, 49 U.S.C. § 1 *et seq.* The Act requires common carriers to file tariffs with the Interstate Commerce Commission (ICC) showing all rates, charges, classifications, regulations, and practices for acceptance and shipment of crude oil. 49 U.S.C. § 6. By regulation, initial tariffs must be filed on not less than ten (10) days notice. 49 C.F.R. § 1300.57(e). BP issued its Local Pipeline Tariffs No. 1 (rules) and No. 2 (rates) on June 3, 1977, proposing an initial rate of $6.35 per barrel, effective June 20, 1977. Supplement 1 to ICC No. 2 was issued by BP on June 15, 1977 with special permission of the ICC (77-4069) to postpone the effective date to June 30, 1977. Both Tariffs and the Supplement were filed in compliance with § 6 of the Act and Rule 57 of Tariff Circular 20, 49 C.F.R. § 1300.57.

The Commission, on June 13, 1977, issued a notice of initiation of summary suspension proceedings to consider the TAPS tariffs.

On June 15, 1977, the ICC Bureau of Investigation and Enforcement, the United States Department of Justice, the State of Alaska, and the Arctic Slope Regional Corporation filed protests to the tariffs, alleging

that the TAPS tariffs were unlawfully high and requesting that the Commission suspend each of the tariffs, including that of BP.

BP submitted its response to the petitions of the four protestants on June 22, 1977, asserting that the Commission lacked the authority either to suspend an initial rate or to prescribe an alternate rate without a full hearing. Without taking evidence, the Commission listened to oral argument on June 27, 1977.

On June 28, 1977, two days before the BP rate was to become effective, the Commission ordered that: the initial tariff rates of BP and the other TAPS owners be suspended for the maximum seven month period allowed by 49 U.S.C. § 15(7); the owners be permitted to file "interim" tariffs in specified amounts ($4.68 in the case of BP) which the Commission would not suspend provided the companies attach undertakings to refund if those interim rates were determined to be excessive; and the companies be required to file similar refund undertakings applicable to the suspended initial rates. (App. B).

BP filed a Petition for Review of the ICC Order in the United States Court of Appeals for the Fifth Circuit (No. 77-2412) on July 8, 1977, pursuant to 28 U.S.C. §§ 2343 and 2344, seeking review and reversal of the Commission's decision to suspend BP's rates for seven months, to prescribe the $4.68 interim rate level, and to require a refund condition on such rate. Also, in order to prevent the occurrence of irreparable harm to petitioner resulting from unrecoverable losses in operating revenues, BP filed a motion with the Court of Appeals requesting the Court to enjoin the effectiveness of the Commission's Order preliminary

to the final resolution of the issues presented to the Court. On July 29, 1977, in a split decision, the Court of Appeals found that the ICC did not act outside its statutory authority and dismissed BP's Petition for Review and denied its motion for an interlocutory injunction. (App. A).

In order to initiate service, BP, on July 30, 1977, filed the $4.68 Commission-prescribed tariff.

On August 12, 1977, petitioner filed a motion with the Court of Appeals for a rehearing with the suggestion that the matter be heard *en banc*. The Court denied the motion on September 8, 1977, stating that it did so in order "to enable the parties to seek review before the Supreme Court without further delay." (App. D).

On September 27, 1977, the ICC issued an Order denying a Petition for Reconsideration filed by BP and other parties. (App. C).

REASONS FOR GRANTING THE WRIT

The Decision Below Raises Significant and Recurring Questions, Not Previously Settled by this Court, as to the Scope of the Commission's Authority Under the Interstate Commerce Act.

A. The Fifth Circuit's Interpretaion of the ICC's Suspension Power Under Section 15(7) of the Interstate Commerce Act is in Direct Conflict With the Express Wording of the Statute, its Legislative History, as well as with Administrative and Judicial Interpretations Given to the Similar Statutory Powers of the Federal Power Commission

BP asserted to the Commission and to the Fifth Circuit that Section 15(7) [1] only empowers the Commission to suspend *changes* filed as to the existing rates, i.e., subsequent increases or decreases to a carrier's effective rate schedule. This position reflects the most widely accepted interpretation of the limits on a

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[1] Section 15(7), in pertinent part, states: "Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority . . . to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. . . ."

regulatory agency's authority to suspend followed at the State and the Federal level. This assertion also was based on the standard principle of statutory construction that a statutory provision is to be read in its entirety, and sentences are not to be distorted in order to derive separate and unlikely meanings. In applying this principle both of the above-quoted sentences must be read in its entirety, and sentences are not to be distorted in order to derive separate and unlike meanings. In applying this principle both of the above-quoted sentences must be read together since both sentences are addressed to the same matter, i.e., the Commission's power to suspend certain rate filings. The first sentence uses the words "any schedule stating a new individual or joint rate" while the second sentence uses the words "the proposed change of rate". There is no indication that Congress intended the words "the proposed change" in the second sentence to mean something less than "any schedule stating a new individual or joint rate" referred to in the first sentence. Accordingly, the word "new" in the first sentence appears to be identical in scope to "the proposed change" in the second sentence. Indeed, if "new" had a double meaning, i.e., new (first and only) and new (changed) then the second sentence would have read "*a* proposed change". Therefore, it appears that the definite article "the" identifies the antecedent "new" as having only *one* meaning: "change".

The legislative history of Section 15(7) demonstrates that the Congress and the President were focusing their concern in charting this piece of legislation on the increasing rate levels of the railroads in operation at the time the suspension power was being considered before Congress. For example, President Taft in submitting

his proposal to the Congress requesting that the ICC be given suspension authority recommended:

> [T]hat the Interstate Commerce Commission be empowered whenever any proposed increase of rates is filed, at once, either on complaint or of its own motion, to enter upon an investigation into the reasonableness *of such change*, and that it be further empowered, in its discretion, to postpone the effective date *of such proposed increases* for a period not exceeding sixty days beyond the date when such rate would take effect.
>
> 41 Cong. Rec. 462, January 19, 1910 (Emphasis Added).[2]

Professor Scharfman—the leading commentator on the Interstate Commerce Act—summarized the scope and effect of the Commission's new power to suspend certain proposed tariffs, as follows:

> Without infringing on the ultimate rights of the carriers to initiate rates and charges, this power enabled the Commission to enter upon the regulating process at an earlier stage and thereby to prevent, at the threshold, *rate changes* likely to violate the basic standards of the Act to Regulate Commerce . . . .
>
> 1 Scharfman, The Interstate Commerce Commission, p. 201 (Emphasis Added).

The Fifth Circuit, however, stated:

> The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act yields little insight on whether the

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[2] Additional legislative history of Section 15(7) also demonstrates that Congress was addressing itself to the increased escalation of rates by the existing rail carriers of that time. See, 45 Cong. Rec. 6304, 6777, 6778 and 6792.

> ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates. 557 F.2d at 781.[3]

Section 205(e) of the Federal Power Act (16 U.S.C. § 824d), was modeled after Section 15(7) of the Interstate Commerce Act, and Section 4(e) of the Natural Gas Act (15 U.S.C. § 717c(e)), was written from Section 205(e) of the Federal Power Act.

The original draft of the Federal Power Act was authored primarily by Commissioner Clyde L. Seavey. On March 8, 1935, Commissioner testified before the House Committee on Interstate and Foreign Commerce as to the provisions of Title II of H.R. 5432. In his opening remarks, Commissioner Seavey stated:

> [The bill] is patterned on the regulatory provisions that have already been accepted by this Commission and adopted by Congress in the *Interstate Commerce Act,* and the Communications Act . . . .
>
> Statement of Commissioner Seavey Before the House Committee on Interstate and Foreign Commerce, 74th Cong., 1st Sess., March 18, 1935. (Emphasis added.)

A comparison of Section 205(e) of the Federal Power Act and Section 15(7) of the Interstate Commerce

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[3] No one debated the issue of suspension of initial tariffs because the Mann-Elkins Act was *only* addressed to changes in existing rail rates, and particularly changes which were rate increases. It was understood by all concerned that such was the purpose of this piece of legislation, therefore, it was not germane to the enactment of this law to argue about initial tariffs.

Act demonstrates that Section 205(e) was virtually copied from Section 15(7). And when Section 4(e) of the Natural Gas Act was drafted it was clearly stated that Section 4(e) was patterned after Section 205(e). This point was made by FPC Solicitor Dozier A. DeVane and Assistant Solicitor Thomas J. Tingley, while appearing before a Subcommittee of the House Interstate and Foreign Commerce Committee, in support of Section 4(e) of the Act. In describing Section 4(e) they stated:

> Except for its application to natural gas companies subject to the jurisdiction of the Commission rather than to electric companies engaged in interstate commerce this section is comparable to Section 205 Part II of the Federal Power Act.
>
> Brief in Support of the Constitutionality of H.R. 11662, Introduced by FPC Solicitor Dozier A. DeVane and Assistant Solicitor Thomas J. Tingley, Before the House Subcommittee of the Committee on Interstate and Foreign Commerce, 79th Cong., 2d Sess., April 2, 1936, at 18.

Mr. DeVane also stated in the course of his testimony:

> [Section 4(e)] is substantially the same as the section on the same subject matter in the Federal Power Act.
>
> Statement of Mr. DeVane, *Id.*, at 28.

Both Section 205(e) and Section 4(e) have their roots in Section 15(7) of the Interstate Commerce Act. A review of all three sections shows that the authority to suspend is couched in the identical operative language. Each statute begins by providing that the suspension power applies to "new" rates and then provides that if the agency investigating the new rate does

not make its decision within the suspension period that the "proposed *change* of rate" will become effective.

For years the FPC has interpreted these two sections as *not* authorizing the Commission to suspend initial tariffs. The regulations adopted by the FPC at 18 C.F.R. § 2.4 provide:

> The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers and suspension of rate schedules under Section 205 of the [Federal Power Act]:
>
> (d) *An initial rate schedule cannot be suspended.* (Emphasis added.)

And 18 C.F.R. § 2.52 further provides:

> The Commission, in approving and adopting the interpretation stated in Section 2.4, applied it also to the suspension of rate schedules under Section 4 of the Natural Gas Act.

The courts have *not* found 18 C.F.R. Section 2.4 or Section 2.52 to be inconsistent with Section 4(e) of the Natural Gas Act or Section 205(e) of the Federal Power Act. *Atlantic Ref. Co.* v. *Pub. Serv. Com. of New York*, 360 U.S. 378 (1959); *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Federal Power Com.* v. *Sierra P.P. Co.*, 350 U.S. 348 (1956). The interpretation assented to by this Supreme Court is that the statutory language empowering the FPC to suspend only authorizes it to suspend new rate schedules which are filed as changes to existing schedules. In fact, this Court specifically recognized that Section 4(e) only gave the FPC the power to suspend "newly changed" tariffs. As pertinent, the Court in *Mobile* stated:

> All that Section 4(e) does, however, is to add to this basic power [to set aside or modify rates], in the case of a *newly changed* rate . . . .
>
> 350 U.S. at 341. (Emphasis added.)

The Court recognized that "the [Federal Power] Commission's only power is that which it has under Section 4(e) to set aside the *new* rate if that is found to be unlawful". (Emphasis is the Court's). *Id.* at 340. And, the Court continued by stating that Section 4(e) does not, however, affect the carrier's right to set its initial rate.

> The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act. Id., p. 343.

Additionally, then Tenth Circuit in analyzing Section 4(e) stated:

> [T]he Commission has no initial rate-making powers and an initial rate fixed by contract remains in effect unless and until it is changed or a proceeding under Section 4(d) and (e) or Section 5(a) of the Natural Gas Act.
>
> *Phillips Petroleum Co.* v. *Federal Power Com.*, 258 F.2d 906, 917 (10th Cir. 1958).

The Fifth Circuit itself has confirmed that initial rates are subject to regulation under Section 5 of the Natural Gas Act (15 U.S.C. § 717d), only, not to Section 4. Section 5 of the Act contains no suspension powers but, like Section 15(1) of the Interstate Commerce Act, only permits an investigation. In *Bel Oil Corporation* v. *FPC*, 255 F.2d 548, 554 (5th Cir.), *cert. denied*, 358 U.S. 804 (1958), the Fifth Circuit found:

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> We also conclude . . . [the increased rates] are 'rate changes' subject to Section 4(d) and not an initial rate subject to Section 5(a) of the Act.

The regulatory scheme of Section 5(a) of the Natural Gas Act duplicates that of Section 15(1) of the Interstate Commerce Act. What the Fifth Circuit has said in interpreting the scope of authority conferred by that language in the Natural Gas Act over natural gas pipeline rates would logically govern the interpretation of the same language appearing in the Interstate Commerce Act over oil pipeline rates. The tariff in question here is an initial rate subject only to Section 15(1) of the Interstate Commerce Act, not a rate change subject to a suspension under Section 15(7) of that Act.

Since the Fifth Circuit's decision in this case is the first instance in which the judiciary has had the opportunity to review the ICC's claims of authority to suspend initial rates, the important issues involved should be resolved by this Court. This is especially so because the Fifth Circuit's rationale for its decision: (1) distorts the plain meaning of the statute; (2) ignores the pertinent legislative history which confirms the plain meaning; and, (3) interprets Section 15(7) of the Act by examining other statutes modeled on that Section in a manner which is in direct conflict with prior decisions of its own, the Tenth Circuit, and the Supreme Court.

B. ICC Has No Licensing Authority Over Potential New Pipeline Carriers

The conflict with other decisions which would allow the ICC to suspend initial tariffs under Section 15(7) would mean that the ICC has recognized that it has the power to prevent the initiation of service by a poten-

tial carrier, only permitting the initiation of service when the company adopts any and all conditions which the ICC may wish to impose. This would constitute *de facto* licensing authority which is nowhere provided or contemplated in the Interstate Commerce Act with respect to oil pipelines.

Certainly, Congress did not intend to provide the Commission in Section 15(7) through the guise of evaluating the reasonableness of rates, the effective authority to prevent the operation of crude oil and products pipelines.[4] Since the Interstate Commerce Act does not provide the ICC with authority to license common carrier pipelines, there is serious question as to whether it had jurisdiction over BP to issue the suspension order.

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[4] Moreover, the exercise of such licensing power by the ICC in this instance is also in apparent contradiction with the Trans-Alaska Pipeline Authorization Act (TAPS Act), 43 U.S.C. §§ 1651 *et seq.*, wherein Congress itself found that the construction and operation of the pipeline was in the public interest. Specifically, 43 U.S.C. § 1651(a) provides: "The Congress finds and declares that: (a) the early development and delivery of oil and gas from Alaska's North Slope to domestic markets *is in the national interest* because of growing domestic shortages and increasing dependence upon insecure foreign sources". (Emphasis added.) The TAPS Act, § 1652(b), further provides: "(b) The Congress hereby authorizes and directs the Secretary of the Interior and other appropriate Federal officers and agencies to issue and take all necessary action to administer and enforce rights-of-way, permits, leases, and other authorizations that are necessary for or related to the construction, operation, and maintenance of the trans-Alaska oil pipeline system, including roads and airstrips, as that system is generally described in the Final Environmental Impact Statement issued by the Department of the Interior on March 20, 1972. The route of the pipeline may be modified by the Secretary to provide during construction greater environmental protection."

Section 1 of Part I of the Act, 49 U.S.C. § 1 (the jurisdictional section) provides, as pertinent:

> (1) That provisions of this part shall apply to common carriers *engaged in*
>
> * * *
>
> (b) *The transportation* of oil or other commodity, except by water and except natural or artificial gas by pipelines, or partly by pipelines and partly by railroad or by water.
>
> (Emphasis added.)

"Transportation" in the context of the instant case, means the actual movement of crude oil by BP as a common carrier for a third party shipper. See, *Pennsylvania R. Co.* v. *Public Utility Commission of Ohio,* 498 U.S. 170 (1936); *Southern R. Co.* v. *Prescott,* 240 U.S. 632 (1916); and *Southern R. Co.* v. *Reid,* 222 U.S. 424 (1912).

As pertinent, Section 1(3)(a) of Part I provides:

> The term 'common carrier' as used in this part shall include all pipeline companies . . . *engaged in* such transportation as aforesaid as common carriers for hire.
>
> (Emphasis added).

At the time it filed its initial tariff, and at the time the ICC issued its Order suspending that tariff, BP was not engaged in interstate transportation of crude oil for hire.

In other words, BP apparently was not, at the time of the ICC's Order, a "common carrier" subject to regulation by the Commission.

The Fifth Circuit merely presumed without further analysis that the ICC properly held jurisdiction over BP at the time of the June 28 Order. This question of ICC jurisdiction over pipelines such as that owned by BP is one which should be addressed.

C. The Holding by the Fifth Circuit that the ICC's "Suggested" Maximum Interim Rate Level was not a Legislative Rate Prescription by the ICC Conflicts With the Supreme Court's Decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F.R. Co.*, 284 U.S. 370 (1932), and the Decision of the Court of Appeals for the District of Columbia in *Moss* v. *CAB*, 430 F.2d 891 (D.C. Cir. 1970).

The Commission's basic rate authority is found in Section 15(1) and Section 15(7) of the Interstate Commerce Act. Under Section 15(1) it is authorized to prescribe just and reasonable rates after full hearing. As pertinent, the Fifth Circuit upheld the Commission's actions, admittedly taken without the required hearing, on the basis that the specification of the rate of $4.68 per barrel as the maximum rate at or below which BP would be allowed to engage in business as a common carrier, was not a legislative prescription of a rate but merely a "suggestion".

In *Arizona Grocery* this Court was faced with the contention:

> [T]hat the mere setting of [rate level] limits by Commission order leaves the carrier free to name any rate within those limits. *Id.* p. 386.

The Court was not impressed with the argument that the ICC, by merely setting rate levels, was not acting in a legislative capacity to prescribe rates, stating:

> The prescription of a maximum rate, or maximum and minimum rates, is as legislative in quality as the fixing of a specified rate. *Id.*, p. 388.

In *Moss* v. *CAB*, *supra*, air carriers filed rate increases pursuant to the Federal Aviation Act, 49 U.S.C. § 1482(g) which, like 49 U.S.C. §§ 15(1) and (7), requires a full hearing before a rate may be prescribed.

The CAB held oral argument, entered an order suspending the rates, and specified a formula under which new rates could be filed without suspension. The carriers, confronted with a choice similar to that facing TAPS owners, acceded to the Board's order and filed new tariffs conforming to the Board's formula.

On appeal the CAB argued, as did the ICC, that the alternative offered the carriers was merely advisory, and not a prescription of rates. The Court rejected the Board's specious reasoning and ruled that the threatened use of the power to suspend rates in excess of those derived by the suggested formula constituted economic coercion and prescription of rates by the Board.

The Court said:

> As a practical matter the Board's order amounted to the prescription of rates because, as the Board admits, the pressures on the carriers to file rates conforming exactly with the Board's formula were great, if not actually irresistable.
>
> * * *
>
> It would seem that upon any realistic interpretation this order involved legislative determination of rates by an agency for the future, as described in the *Arizona Grocery* case.
>
> It would be blinking reality to hold, as the Board argues, that the order of September 12 did no more than suspend and initiate an investigation of the rates proposed by the carriers . . . . The Board did all that it could, short of formally styling its order

> as rate-making, to induce the carriers to adopt the proposed rates.
>
> 430 F.2d at 897-98.

In the instant case, the economic coercion imposed on BP was even greater than on the carriers in *Moss*, and the rates prescribed are more injurious since BP had not yet begun operations and had no existing rate to fall back on. See, *SCRAP* v. *United States*, 346 F. Supp. 189 (D.D.C. 1972), *rev'd. on other grounds*, 412 U.S. 669 (1973), wherein the three-judge District Court stated:

> [A] suspension decision which effectively blackmails the carriers into submitting agency-authorized rates is functionally indistinguishable from an agency order setting those rates . . . .
>
> 436 F. Supp. at 197.

Therefore, the holding of the Fifth Circuit that the ICC had not acted in its legislative capacity to prescribe BP's rates creates an unacceptable conflict of court decisions as to what constitutes rate prescription.

D. The Decision of the Fifth Circuit Upholding the ICC's Establishment of BP's Interim Rate Absent a Full Hearing is in Conflict with the Express Wording of Section 15(1) of the Interstate Commerce Act as Well as Relevant Decisions of the Supreme Court and Other Federal Courts.

Under Section 15(1) the Commission may prescribe rates but only after it has conducted a "full hearing", providing an adequate opportunity for all interested parties to present evidence and respond to arguments based on the evidence presented, and has made a determination that the carrier-initiated rate "is or will be unjust or unreasonable or unjustly discriminatory or

unduly preferential or prejudicial . . . ." 49 U.S.C. § 15(1).

No such hearing pursuant to Section 15(1) was held prior to the Commission establishing BP's $4.68 maximum rate level. The only proceeding which took place prior to the June 28 Order was an informal proceeding by the Commission reviewing the arguments of the four complainants and the answers of the eight respondents as to whether or not the Commission should decide to investigate and/or suspend the proposed tariffs of the eight TAPS owner companies. Only *after* the Commission's June 28 Order did any investigation and hearing pursuant to Section 15(1) begin.

The circumstances of the proceeding leading up to the June 28 Order demonstrate that BP was not provided with an adequate hearing. The Commission requested each of the parties to present an explanation of the rate levels to be incorporated in their proposed tariffs. The Commission did not notify the companies that such material had to be so definitive as to sustain a determination of justness and reasonableness, and that the Commission was considering establishing its own rates for BP. The material filed by BP was prepared to conform with the procedures and calculations applicable to oil pipeline tariffs which had been accepted by the Commission for the past 36 years.

Neither BP nor any other party had advance notice that the Commission would consider departing from its long-established approach to rate determination. Nevertheless, on the basis of summary material filed by BP and without taking testimony, or permitting direct or cross-examination, or discovery, the ICC departed from past practice and prescribed BP's rates.

The proceedings underlying the Commission's Order of June 28 were "informal" proceedings conducted under 49 C.F.R. § 1100.200 which do not satisfy the statutorily-mandated *full hearing* required by Section 15(1), which is a prerequisite to the ICC establishing a rate. *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 671-72 (1963); *North Carolina Natural Gas Corp.* v. *United States*, 200 F. Supp. 745, 749 (D. Del. 1961); *Bison Steamship Corp.* v. *United States*, 182 F. Supp. 63, 67 (N.D. Ohio 1960).

The decision of the Fifth Circuit on this issue, therefore, is in conflict with existing precedent and the express wording of Section 15(1) requiring the ICC to hold a "full hearing" prior to setting a carrier's rates. The issue should be reviewed and resolved by this Court.

E. The Decision of the Fifth Circuit Upholding the Commission's Action Imposing Refund Obligations On the Collection of Both the Interim Rate and the Filed Initial Rate Is in Error.

In its decision issued June 28, 1977, the Commission ordered that the carriers incorporate in their interim tariffs a refund provision to the effect that if the prescribed rates should exceed the rates subsequently authorized by the ICC, the carriers will refund the difference between the rate charged and the rate subsequently authorized; and, the ICC further required that the carriers file similar refund provisions applicable to the proposed original rates.

The ICC cited no statutory authority for the imposition of such refund conditions either in its argument to the Court. The Fifth Circuit, nevertheless, concluded that while they could find no express statutory language empowering the ICC to attach refund

conditions to both tariffs, the power of the ICC to impose refund conditions exists in the form of a "valid corollary to the suspension power". This finding by the Fifth Circuit is without merit and will only serve to obscure the boundaries of the ICC's authority over pipelines. See, *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353 (D. Colo. 1971), *aff'd.* 404 U.S. 802 (1971).

The resort by an agency to unexpressed "implied" powers to fashion remedies allegedly needed to protect the public interest requires a showing that there is an inadequate remedy under existing common law or statutory authority. No such showing has been made.

The ICC has express statutory authority to attach refund conditions in certain specific limited circumstances, and it has express authority to require reparations. These two express statutory powers define the outer boundaries of the Commission's authority to deal with past rates and charges.

As pertinent, Section 15(7) of the Act provides the Commission with the following authority:

> [B]ut in case of a *proposed increased rate or charge* for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such *increase,* specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such

> portion of such *increased rates* or *charges* as by its decision shall be found not justified.
>
> 49 U.S.C. § 15(7) (Emphasis added.)

BP's initial rate of $6.35 was not a "proposed increased rate or charge" within the meaning of Section 15(7). And the ICC, by compelling BP to file an interim rate of $4.68, which will be superseded on January 30, 1978 by the suspended initial rate, cannot convert that initial rate into an "increased rate" within the meaning of Section 15(7). Therefore, there is no statutory authority to attach a refund condition to either the interim or the initial rate.

Section 8 of the statute, 49 U.S.C. § 8 provides:

> In case any common carriers subject to provisions of this chapter shall do, cause to be done, or permit to be done, any act, matter or thing in this chapter prohibited or declared to be unlawful . . . such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter together with a reasonable counsel or attorney's fee to be fixed by the Court in every case of recovery which attorney's fee shall be taxed and collected as part of the cost in the case.

This provision of the statute, referred to as the "reparation" provision, authorizes any person, including any shipper, or any person having an interest in the oil shipped, to bring an action before the ICC against each and every carrier if the person claiming injury believes that the rate recovered by the carrier from the transportation of oil exceeded the just and reasonable rate required by the statute. Under Section

8, in the event that the rate charged by the carriers from the commencement of operations on August 1, 1977 until January 30, 1978, when a different rate goes into effect, exceeds a just and reasonable rate for the carriage of oil during that period of time, any person injured as a result of the collection of an unreasonably high rate, has the right to reparations. There has been no showing that this statutory remedy is so inadequate that resort to implied or corollary powers is required. Indeed, the attempted creating of an extra-statutory remedy served another purpose.

The Commission, by imposing a refund condition on the interim rate, has departed from the Section 8 standard for determination of reasonableness based on actual experience, and the Section 15(7) standard based on "typical" conditions which may prevail in a hypothetical future period. Many of the carriers filed Petitions for Reconsideration of the interim rates with the ICC, pointing out that the initial rate filings were made having in mind long-range throughput capacity of the system, and that during the seven month suspension period, volumes transported would be significantly below capacity. BP demonstrated that the interim rates prescribed by the ICC, when applied to actual volumes to be transported through the system, would not recover BP's interest costs, and thus will generate negative returns on equity when standard accounting procedures are applied. The ICC, by Order issued September 20, 1977, denying all Petitions for Reconsideration, stated that the measure of reasonableness of rates applicable to the first seven months of operation would not be the actual volumes transported during that period of time but projected normalized system capacity. Thus, the Commission

has ruled that persons claiming injury as a result of alleged excessive rates need not prove that rates were unreasonable when applied to actual operating experiences during the applicable period. The standard of proof required for reparations under Section 8 has been jettisoned.

Not only has the Commission proposed to apply a totally different standard of proof than that which would have been applicable in a reparation proceeding, it also, by utilization by a refund procedure, proposed to avoid the procedural requirements of the Administrative Procedure Act. A reparation proceeding is an adjudication under § 5 of the Administrative Procedure Act, 5 U.S.C. § 554, and requires a decision by the person who hears the evidence. However, prospective rate-making is treated as "rule making" under the Administrative Procedure Act and, where due and timely execution of its functions imperatively requires the omission of the initial decision of an Administrative Law Judge, the agency has the authority to omit such decision. 5 U.S.C. § 557. Claiming authority under this Section of the Administrative Procedure Act, the Commission, by Order served July 11, 1977, has ordered that the initial decision of the Administrative Law Judge be omitted. (App. E.) Such an omission would be illegal under reparation proceedings.

Thus, the Commission, by invoking an unspecified collateral authority to attach a refund condition to its suspension of an initial rate, proposes to deprive carriers not only of their procedural rights in the review of past rates, but also totally to alter the criteria by which the reasonableness of such rates will be deter-

mined. Such an action is without precedent and should be set aside.

F. The Action of the ICC and the Holding of the Fifth Circuit Conflict With the Supreme Court's Holding in *Arizona Grocery Co. v. Atchison, T. & S.F.R. Co., Supra*, Declaring it Unlawful for the ICC to Order Reparation Payments from a Commission-Made Rate.

In *Arizona Grocery* the ICC, after hearing, issued an order finding that any future rates charged by Atchison above 96.5 cents would be unreasonable and ordered that Atchison charge a rate not exceeding that figure. Atchison complied by filing a rate of 96 cents. Later, Atchison voluntarily reduced its rate to 84 cents. Subsequently, the ICC issued another order modifying its previous order and establishing Atchison's maximum rate level at 71 cents. Complainant shippers sued Atchison for reparations under Section 8 of the Interstate Commerce Act, 49 U.S.C. § 8, for the difference between the rates they paid above 71 cents and below the 96 cent level. The ICC held for complainants and authorized reparations for the difference.

The Court held that refunds of the differences paid by the carrier as reparations between the two ICC-prescribed rate levels was impermissible. The Court reasoned that Section 15(1) of the Interstate Commerce Act only provided the ICC with authority:

> [T]o fix a maximum or minimum *reasonable* rate; for it is precluded by statute from fixing one which is unreasonable, which by the statute is declared unlawful. If it were avowedly to attempt to set an unreasonable high maximum its order would be a nullity. (Emphasis is the Court's).
>
> *Arizona Grocery, supra*, p. 387.

In other words, there could be no reparations for the difference between the first Commission-prescribed rate of 96 cents and the second Commission-prescribed rate of 71 cents inasmuch as the 96 cent rate level was necessarily a *reasonable* rate. As Justice Roberts, in writing for the Court, stated:

> Where the Commission has upon complaint, and after hearing, declared what is the maximum reasonable rate to be charged by a carrier, it may not at a later time, and upon the same or additional evidence as to the fact situation existing when its previous order was promulgated, by declaring its own finding as to unreasonableness erroneous, subject a carrier which conformed thereto to the payment of reparation measured by what the Commission now holds it should have decided in the earlier proceeding to be a reasonable rate.
>
> Id., p. 390.

In the instant proceeding the Commission has imposed a refund condition on the $4.68 rate level so that in the event it later sets a rate below that level the shippers can receive a refund for the difference in prescribed rate levels. Such action by the Commission clearly conflicts with this Court's decision in *Arizona Grocery, supra.* For the Commission, in establishing BP's $4.68 rate level, necessarily established a reasonable rate under Section 15(1) of the Act from which no refunds or reparations may be had lest the Commission acknowledge that the $4.68 rate level it set was an unreasonable one which would then make its Order a nullity.

CONCLUSION

For these reasons, a *writ of certiorari* should issue to review the judgment and opinion of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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DATED: October 12, 1977

Certificate of Service

I hereby certify that the requisite number of copies of the foregoing Petition for a Writ of Certiorari were served this 12th day of October, 1977, by First Class Mail, to all parties of record and:

The United States Attorney
United States Court House
Washington, D.C. 20001

The Solicitor General of the United States
Department of Justice
Constitution Avenue, N.W.
Washington, D.C. 20530

All parties required to be served have been served.

/s/ Robert J. Grady

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APPENDIX

A. Decision of the Fifth Circuit in *Mobil Alaska Pipeline Co.* v. *United States,* 557 F.2d 775 (July 29, 1977) A-1

B. June 28, 1977 Order of the Interstate Commerce Commission in Investigation and Suspension Docket No. 9164 (Rate Filings) and No. 36611 (Rules and Regulations) With June 29, 1977 Correction Notice B-1

C. September 27, 1977 Order of the Interstate Commerce Commission Denying Petitions for Reconsideration of its June 28, 1977 Order C-1

D. September 8, 1977 Order of the Fifth Circuit Denying BP's Petition for Rehearing D-1

E. July 7, 1977 Order of the Interstate Commerce Commission Setting the Case for Hearing E-1

F. Statutory Appendix F-1

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2392

MOBIL ALASKA PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents,
and
SOHIO PIPE LINE COMPANY,
AMERADA HESS PIPELINE CORPORATION,
UNION ALASKA PIPELINE COMPANY, *Intervening Petitioners*,
STATE OF ALASKA, ARCTIC SLOPE
REGIONAL CORPORATION, *Intervening Respondents*.

No. 77-2412

BP PIPELINES, INC., *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Respondents*.

No. 77-2421

EXXON PIPELINE COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, *Respondents*,
and
UNION ALASKA PIPELINE COMPANY, *Intervening Petitioner*.

No. 77-2437

ARCO PIPE LINE COMPANY, *Petitioner*,

v.

UNITED STATES OF AMERICA and
THE INTERSTATE COMMERCE COMMISSION, ET AL,
Respondents,

STATE OF ALASKA, *Intervening Respondent*.

ON PETITIONS TO REVIEW AN ORDER OF THE
INTERSTATE COMMERCE COMMISSION

July 29, 1977

Before BROWN, Chief Judge, GODBOLD and RONEY, Circuit Judges. PER CURIAM:

Four petitions seeking injunctive relief and review of a June 28, 1977 Order of the Interstate Commerce Commission are before us, together with the United States' motion to dismiss.[1] For reasons discussed below, we grant the government's motion.

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[1] No. 77-2392, Petition of Mobil Alaska Pipeline Company (Mobil) to Annul, Set Aside and Enjoin Enforcement of an Order of the Interstate Commerce Commission and Applications and Motions for Temporary Restraining Order and Interlocutory Injunction. The respondents in this case were the United States, the Interstate Commerce Commission (ICC or Commission) and the latter's individual Commissioners. The State of Alaska moved to appear as a party. The Arctic Slope Regional Corporation moved to intervene. Both opposed Mobil's petition. Sohio Pipe Line Company moved to appear as a party in support of Mobil's petition, as did Amerada Hess Pipeline Corporation. Union Alaska Pipeline Company moved to appear as a party.

No. 77-2412, Petition to Enjoin, Set Aside, Suspend and Review Order of the Interstate Commerce Commission and Motion to Stay, Restrain and Suspend Order of the Interstate Commerce Commis-

Background of the Case

This controversy arose on the eve of the flow of crude oil through the Trans Alaska Pipeline System (TAPS)[2] which stretches from oil fields in Alaska's North Slope at Prudhoe Bay to Valdez, Alaska, some 800 miles distant. The pipeline was constructed by the Alyeska Pipeline Service Corporation, an agent for its eight owners.[3]

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sion filed by BP Pipelines, Inc. (BP), naming the United States and the ICC as respondents.

No. 77-2437, Petition for Review and Application for Interlocutory Injunction filed by Arco Pipe Line Company (Arco). The United States, the ICC and its individual Commissioners were named as respondents. Alaska also sought leave to appear as a party in opposition to Arco's petition.

No. 77-2421, Petition for Review and Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review, filed by Exxon Pipeline Company (Exxon), naming the ICC and the United States as respondents. Union Alaska Pipeline Company moved to appear as a party.

The United States moved for consolidation and to dismiss. The motion for consolidation was granted from the Bench during oral argument on July 19, 1977. The court hereby grants all motions to intervene.

[2] In 1968 massive reservoirs of oil were discovered at Prudhoe Bay. Plans to construct the pipeline were announced in 1970. From its beginning the pipeline has been grist for judicial mills. *See, e.g.*, *Wilderness Society* v. *Morton*, 479 F.2d 842 C.A.D.C., 1975) (en banc); *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), *rev'g* 495 F.2d 1026 (C.A.D.C., 1974). Indeed, it literally took an act of Congress to prevent further environmental litigation. Trans-Alaska Pipeline Act, 43 U.S.C.A. § 1652(d). Construction was thus delayed until 1974 and took three years.

Oil began to enter the pipeline on June 20, 1977. An explosion and fire at pump station No. 8 on July 8, 1977, resulted in a temporary shutdown. The parties have informed the court that the first oil is expected to reach Valdez around July 26, 1977.

[3] Each of the following companies owns an undivided interest in TAPS:

Between May 27, 1977 and June 15, 1977, seven TAPS owners filed the tariffs [4] which are at issue here,[5] having effective dates ranging from June 20 to July 1, 1977. Protests were filed by the Department of Justice, the State of Alaska,[6] the Arctic Slope Regional Corporation,[7] and the

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Company	*Percentage Ownership*
Mobil Alaska Pipeline Co.	5.00%
Sohio Pipe Line Co.	33.34%
ARCO Pipe Line Co.	21.00%
Exxon Pipeline Co.	20.00%
BP Pipelines Inc.	15.84%
Phillips Alaska Pipeline Corp.	1.66%
Union Alaska Pipeline Co.	1.66%
Amerada Hess Pipeline Corp.	1.50%

These companies are subject to ICC regulation by virtue of the Interstate Commerce Act, 49 U.S.C.A. § 1(1)(b), which covers common carriers engaged in the transportation of oil by pipeline.

[4] Tariffs must be filed with the ICC pursuant to 49 U.S.C.A. § 6(1).

[5] Because Phillips, the eighth owner, filed its tariff on June 20, 1977 with an effective date of July 20, the time for filing protests had not expired by June 28, the date of the ICC's order. Phillips' tariff was thus not covered by the Order and is not before this Court.

[6] Alaska owns a one-eighth royalty interest in the oil from the Prudhoe Bay fields. In addition, Alaska has an oil production severance tax. Both the value of the royalty oil and the severance tax are tied to the value of the oil at the point of production, *i.e.*, the wellhead value. Alaska contends that the wellhead value is generally determined by the market price *less* the transportation costs. Therefore, as the TAPS carrier rates increase, the value of Alaska's interest decreases.

[7] Prior to the enactment of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C.A. §§ 1601-1627, the Inupiat Eskimos held claims of unextinguished aboriginal title to the entire Arctic Slope of the State of Alaska, an area which encompasses Prudhoe Bay and much of the land over which TAPS was constructed. The Arctic Slope Regional Corporation is one of 12 corporations established pursuant to ANCSA to conduct Native Alaskan business for profit. 43 U.S.C.A. § 1606. As compensation for the extinguish-

ICC's Bureau of Investigation and Enforcement. The Commission heard oral argument on June 27, 1977[8] without making any formal evidentiary record.[8a]

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ment of all aboriginal land claims, ANCSA granted Alaskan Natives fee title to approximately 400 million acres of land. 43 U.S.C.A. §§ 1611, 1613. All future revenues derived from that land will be the property of the Native people. 43 U.S.C.A. § 1606. ANCSA further provided for cash compensation of $962,500,000 to be paid over a period of years, a portion of which is to be derived from a 2% royalty on the wellhead value of all crude oil production in Alaska under state or federal leases. 43 U.S.C.A. §§ 1605, 1608. Thus, on their theory, the Native Alaskans' revenue is inversely related to the rise in TAPS tariffs.

[8] Recognizing the importance of the controversy, the ICC, in an extraordinary move, bypassed its usual procedural channels and took the suspension proceeding for its own direct consideration. While Commission regulations consider a protest and petition to suspend "as addressed to the discretion of the Commission," 49 C.F.R. § 1100.42 (1976), suspension protests and petitions are in practice routinely referred to the Board of Suspension. See 49 C.F.R. § 1100.200 (1976); Mobil Memorandum In Support of Application for Interlocutory and Temporary Restraining Order at 7; Reply of Interstate Commerce Commission in Opposition To Application For Interlocutory Injunction and Temporary Restraining Order at 4. The Commission heard arguments for one full day before issuing its suspension order.

Although a transcript of that hearing was made, the papers on file with the Court contain only excerpts from that proceeding. *E.g.*, Appendix A to Justice Department's Memorandum in Support of Motion to Dismiss; Appendix C to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order. Also, the tariff filings themselves, with any supporting submissions, were not filed with the Court. On file with the Court, however, were several exhibits such as "Reply of Exxon Pipeline Company to Protests" (Appendices of Exxon Pipeline Company for Expedited Consideration or in the Alternative Stay Pending Review) and Statements by C. R. Thompson, Controller-Treasurer of Mobil Alaska Pipeline Co. (Appendix D to Memorandum of the State of Alaska in Opposition to Application for Interlocutory Injunction and Temporary Restraining Order).

[8a] The briefs of the parties contained references to the infor-

The ICC's June 28 Order[9] instituted an investigation into the lawfulness of the tariffs pursuant to 49 U.S.C.A. §§ 15(1)[10] and 15(7).[11] The rates filed were suspended for

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mation which the ICC apparently had before it during the suspension proceeding. Such information included: (i) written representations in the form of protests from the State of Alaska, the Arctic Slope Regional Corporation, the United States Department of Justice, and the Bureau of Investigations and Enforcement of the ICC (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 2); (ii) verified statements offered by the TAPS Carriers in support of their rate calculations (Memorandum in Support of Exxon Pipeline Company's Motion for Expedited Consideration or, in the Alternative, for a Stay Pending Review at 46) [hereinafter Exxon Memorandum]; (iii) statement of Dr. Michael J. Ileo (submitted with Alaska's protest) which discusses the unreasonableness of carriers' rate calculations (Exxon Memorandum at 46); (iv) sworn testimony of Raymond B. Gary, a Managing Director of Morgan Stanley & Company, and Dr. Ezra Solomon, Dean Witter, Professor of Finance at the Graduate School of Business of Stanford University, filed in Ex Parte No. 308, *Valuation of Common Carrier Pipelines* (Exxon Memorandum at 38); (v) letters sent from Mobil Alaska Company to ICC (obtained under the Freedom of Information Act, 5 U.S.C.A. § 552) which deal with such topics as TAPS start-up, depreciation, dismantling and restoration, anticipated salvage, and estimated annual operating expenses (Memorandum of the State of Alaska in Opposition to Applications for Interlocutory Injunction and Temporary Restraining Order at 25-6); (vi) calculation of the rates of return on valuation for 90 regulated pipelines for the years 1970-72, made by George M. Stafford, former ICC Chairman (Exxon Memorandum at 40-1); and (vii) a variety of carrier-provided data concerning the normal traffic volume for the beginning years of TAPS, costs, depreciation charges, and investment calculations (ICC June 28 Order at 5-7 and Appendices to Order).

[9] The Order is set forth as an Appendix to this opinion.

[10] 15 U.S.C.A. § 15(1) reads in pertinent part as follows:

> "Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending

seven months without prejudice to the filing of interim rates during the suspension period. The Commission addi-

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complaint or without any complaint whatever, the Commisson shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title . . . is or will be unjust or unreasonable . . . the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged . . . and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be . . . ."

[11] 15 U.S.C.A. § 15(7):

"Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes

tionally authorized the filing, upon not less than one day's notice, of interim rates which were not to exceed certain levels, subject, however, to the condition that the carriers keep account and that (i) the interim tariffs contain a refund provision to the effect that if the new rates exceed those subsequently authorized or prescribed by the ICC, the carriers will refund the excess with interest; and (ii) the carriers file a similar refund provision applicable to the original proposed rates. The Order thus had the following effect on the carriers' proposed rates per barrel:

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into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. . . ."

	As Filed by TAPS Owners	Authorized By Order [12]	Reduction
Amerada Hess Pipeline Corp.	$6.44	$4.85	$1.59
Arco Pipe Line Company	6.04	4.91	1.13
BP Pipelines Inc.	6.35	4.68	1.67
Exxon Pipeline Company	6.27	5.10	1.17
Mobil Alaska Pipeline Company	6.31	4.84	1.47
Phillips Alaska Pipeline Corp.	6.22	Not Yet Acted Upon	
Sohio Pipe Line Company	6.16	4.70	1.46
Union Alaska Pipeline Company	6.09	4.89	1.20

The carriers estimate that the Order will result in an irretrievable $340 million loss over the seven-month suspension period.

The suspension left the pipeline companies without tariffs on file, and they are forbidden by § 6(7) of the Act to engage or participate in the transportation of oil unless they file new tariffs. The carriers thus had two alternatives open to them. They could file new tariffs within the ICC guidelines or they could shut down the TAPS system for the seven-month suspension period. Unhappy with either choice, the pipeline companies filed their petitions and motions and the United States moved to dismiss.[13] This Court heard oral argument on July 19, 1977.

The major issues raised by the parties are (i) whether we have jurisdiction to review the ICC order; (ii) whether the Commission has the authority under 49 U.S.C.A. § 15(7)

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[12] According to the ICC, these rates reflect a 10% rate of return on tentative valuation. See pp. 4-8 of the ICC Order, and Appendices 2-5 thereto.

[13] *See* note 1, supra.

to suspend the first and only ("initial") rate of a carrier; (iii) whether as part of a purported suspension order the ICC may prescribe or suggest optional maximum interim rates; (iv) whether the ICC's order authorizing the filing of maximum interim rates without a full hearing amounted to a prescription of rates within the meaning of 49 U.S.C.A. § 15(1); (v) whether the Commission acted outside its statutory authority in ordering the refund provisions in the tariffs; (vi) whether the Commission's action was arbitrary, capricious or constituted an abuse of discretion; (vii) whether the maximum interim rates authorized were confiscatory in violation of the Fifth Amendment.

1. *Reviewability and the authority of the Commission*

The government has moved to dismiss the petitions for review on the ground that this court has no jurisdiction to review suspension orders of the ICC issued pursuant to 49 U.S.C.A. § 15(7). True, courts do not have jurisdiction to review ICC suspension orders. Congress has committed the decision to suspend or not to suspend proposed rates exclusively to the discretion of the Commission. *U.S.* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 37 L.Ed.2d 254 (1973); *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658, 10 L.Ed.2d 52 (1963); K. Davis, ADMINISTRATIVE LAW TREATISE 966 (1970 Supp.). As a panel of this circuit noted:

> The Interstate Commerce Commission . . . is vested with power to suspend, at its discretion, for a period of seven months, rates filed with it pending hearing and decision on their lawfulness. 49 U.S.C. § 15(7). The existence of this power in the ICC, it has been held, evinces the deliberate decision of Congress to extinguish judicial power to grant any injunction which interferes with the Commission's discretionary decision to suspend rates filed with it at anytime before the Commission finally determines the lawfulness of the rates.

Texas v. *Seatrain International*, 518 F.2d 175 at 178 (CA5, 1975). But the rule of unreviewability presupposes an affirmative answer to a preliminary inquiry into whether the Commission has acted within the authority granted to it by § 15(7). A suit to enjoin a suspension order may be entertained if the complaint shows that the agency lacked the basic statutory authority to issue such an order. *Great Western Packers Express, Inc.* v. *U.S.*, 246 F.Supp. 151, 154 (D.Colo.,1965) (three-judge court); *Long Island Railroad Co.* v. *U.S.*, 193 F.Supp. 795, 800 (E.D.N.Y.,1961) (three-judge court).

Section 15(7) gives the ICC the power to suspend "any schedule stating a new individual or joint rate fare or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate fare or charge" for a period not to exceed seven months, and to order an investigation and full hearings on those new charges. The above language has no plain meaning. The term "new" can refer to both changed and initial rates or only to changed rates. The statutory history of the Mann-Elkins Act (1910), which added § 15(7) to the Interstate Commerce Act, yields little insight on whether the ICC is empowered to suspend initial rates since no one seems to have debated or even discussed this specific question. However, our examination of statutes modeled on § 15(7) and of the legislative policy underlying that section convinces us that it was Congress' intention that the Commission have the power to suspend initial as well as changed rates.

Section 15(7) has served as the prototype of other agency rate suspension provisions in the Interstate Commerce Act and in other regulatory acts as well. In many of these acts, when Congress has wished to exclude initial rates, either in part or across the board, it has done so in specific language. In the Interstate Commerce Act itself, there are provisions modeled on 49 U.S.C.A. § 15(7) giving the ICC authority

to suspend new rates, proposed by motor carriers, 49 U.S.C.A. § 316(g), by water carriers, 49 U.S.C.A. § 907(g)(i), and by freight forwarders, 49 U.S.C.A. § 1006(e). Each of these provisions contains a grandfather clause exempting certain initial rates from suspension. If initial rates were not covered there would have been no need for the grandfather clauses. Another example is 49 U.S.C.A. § 1482(g), which gives the Civil Aeronautics Board suspension powers similar to those granted to the ICC with one significant difference: it specifically provides that "[t]his subsection shall not apply to any initial tariff filed by any air carrier." Thus, we conclude that if Congress had wished to exempt initial tariffs from the purview of § 15(7) it would have done so specifically, and that Congress' omission to specially exempt initial rates in this section indicates its intent that initial rates be subject to the ICC's § 15(7) suspension powers.

The conclusion that initial rates are covered by § 15(7) is consistent with the legislative policy underlying that section. Section 15(7) evidences a belief on the part of Congress that the normal hearing and reparation processes of the ICC are not sufficient to protect the public against potentially excessive charges. The need for this protection is no less in the case of initial rates than in the case of changed rates. Absent a specific legislative decision that initial rates are not covered, it would be illogical to assume that Congress intended to leave such a gap in the legislative scheme.

2. *The suggested interim rates*

The petitioners challenge the action of the Commission with respect to suggested interim rates. They point out that § 15(7) contains no provisions for establishing interim rates and that, in any event, rates can only be prescribed after full hearings. See 49 U.S.C.A. § 15(1). The Commission's position is that it has not actually fixed a rate but, in

a situation of urgent national interest and as an incident of its power to suspend, it has given advance indication of the maximum rates with respect to which—if the carriers elect to file them—the Commission will not exercise its power to suspend.

The Commission Order refers to "interim rates," but baldly describing the issue as the power of the Commission to set interim rates is misleading. As we have held, the Commission had the power to unconditionally suspend the proposed tariffs, leaving the carriers without any tariffs but free to file new tariffs if they wished, which would be subject to new exercise of the Commission's power to suspend. The ICC chose not to exercise to its full limits the drastic but available power of unconditional suspension and instead announced that if petitioners would file interim tariffs at or below Commission-announced ceilings the Commission would not unconditionally suspend the tariffs originally filed.

The petitioners maintain that the § 15(7) power to suspend is an all or nothing instrument. We think not. The Commission may elect to exercise its power less than fully, or putting it another way, may partially waive the suspension power. We are guided by the Supreme Court's decision in *U.S.* v. *Chesapeake & Ohio Railroad Co.*, 426 U.S. 500, 49 L.Ed.2d 14 (1976) ("*Chessie*"). In *Chessie* the ICC suspended a carrier-proposed tariff increase but at the same time authorized the railroads to refile, incorporating conditions which would assure that the additional revenue would be expended on capital improvements and deferred maintenance. The Supreme Court upheld the refiling provision as directly related to the ICC's suspension power. The Court noted that the ICC could simply suspend the originally proposed rates for the full statutory seven-month period but that instead "it pursued a more measured course and offered an alternative tailored far more precisely to the particular circumstances presented." 426 U.S. at 514, 49

L.Ed.2d at 23. *Chessie* establishes the right of the ICC to choose to exercise its suspension power to less than its outer limits in order to meet the needs of a particular situation. The ICC's authorization to file interim rates was the type of "more measured course" or partial waiver which the Supreme Court approved in *Chessie*.

Moss v. *CAB*, 430 F.2d 891 (C.A.D.C.,1970), relied on by the petitioners, is not to the contrary. In *Moss* the Court of Appeals for the District of Columbia held that the Civil Aeronautics Board (CAB) could not, after ex parte meetings with the air carriers, "suggest" a comprehensive rate formula that it would not suspend or investigate. *Moss* involved what for all intents and purposes was the establishment of permanent rates. By attempting to establish a permanent rate structure through its suspension power the CAB took actions which went beyond the strongest action it could have taken under its suspension power, i.e., suspending the proposed increases for 180 days. 49 U.S.C.A. § 1482(g). In essence what the CAB attempted to do in *Moss* was to waive a right it did not have. In contrast, the ICC's suggestion of interim rate ceilings in the present case is an action which is more restrained, or measured, than its right to unconditionally suspend the original tariff for a period of seven months. If in seven months the ICC has not completed its investigation, the carriers will be free to levy their originally filed charges subject to a refund order.

Also, in *Moss* the practical effect of the CAB's actions would have been to immunize the suggested permanent rate structure from judicial review.[14] In the present case the ICC has not sought to shield its final decision from judicial review. Instead the Commission has commenced hearings on the original rates proposed by the petitioners, and any eventual final order stemming from those hearings is subpect to judicial scrutiny.

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[14] Judge Leventhal in his concurring opinion in *Continental Airlines, Inc.* v. *CAB*, 522 F.2d 107 at 131 (C.A.D.C., 1975) (en banc), emphasized the evasion of judicial review as the key to *Moss*.

In a case involving initial rates, if the ICC could not couple its suspension order with a statement of maximum allowable interim ceilings, the Commission would be forced to allow initial rates to go into effect, even if facially outrageous, subject only to lengthy investigation and hearing procedures, or to watch a possibly vital public service close down for want of a rate schedule. We doubt the Congress would have intended that the Commission face that Hobson's choice.

The use of interim rates as a condition to a suspension order is not unprecedented. In I & S Docket No. 8645, Orders (May 27, 1971, and June 29, 1971) the Commission ordered that increased lighterage charged proposed by the Penn Central Railroad be suspended but allowed the company to file interim rates containing additional charges not to exceed 50% of those initially proposed. The ICC's orders also required that Penn Central maintain an account from which refunds could be made to the extent that the proposed tariffs could not be justified to the Commission. In *Port of New York Authority* v. *U.S.*, 451 F.2d 783, 785-88 (CA2, 1971), the Second Circuit held that the Order was unreviewable and that federal courts lacked subject matter jurisdiction over an action challenging the Order.

We conclude that the ICC as corollary to its suspension power had the power to set out allowable rate ceilings for the seven-month period which, if filed, it would not suspend. Therefore, this aspect of its Order is not reviewable by this court.

3. *The refund provisions*

As a condition precedent to the interim rates which the Commission stated it would accept, the Commission required the carriers to establish refund provisions for use in the event that either the interim rates or the originally filed tariffs [15] or both should be found to be excessive.

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[15] As we noted prevously, if the Commission does not complete

With respect to this exercise of power for the seven-month period, like the power to suggest the interim rates themselves, we find this is a valid corollary to the suspension power, which we lack jurisdiction to review. *See Port of New York Authority* v. *U.S., supra.* We are less certain of the Commission's power to require the carriers to establish refund provisions with respect to the originally filed rates. However, we view this exercise of power as corollary to the power to suspend. Thus, insofar as the Commission's order reaches beyond the seven-month period, we are guided by *Chessie,* where the condition upheld by the Supreme Court was permanent.[16]

4. *Arbitrariness and confiscation*

The petitioners assert that the Commission action was an abuse of discretion and that the interim rate ceilings are so grossly insufficient that they are confiscatory in violation of the Fifth Amendment. Restating, we understand these contentions to be that even if the Commission is authorized by § 15(7) to act with respect to the subject matter, its exercise of power departed from constitutional standards. Assuming that we can review the Commission Order through these constitutional entry points the record before us gives no basis upon which we can act.

All motions to intervene are GRANTED. All motions for stay, suspension, injunction and other forms of interlocutory relief are DENIED. The motion of the United States to dismiss the petitions for review is GRANTED.

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its investigation within seven months from the date of its suspension Order, the carriers' originally filed rates automatically go into effect.

[16] Under § 15(7) the Commission may require carriers to keep records and make refunds after the seven-month period has expired. This expressly conferred authority is not what we rely upon—it relates to "a proposed increased rate or charge."

No. 77-2392—Mobil Alaska Pipeline Company v. United States of America and Interstate Commerce Commission

RONEY, Circuit Judge, dissenting:

I respectfully dissent. The thesis of the Commission is that it has the unreviewable authority to suspend the pipeline's initial rate filing and, as an adjunct of that authority, it has the power to fix an unreviewable interim rate for the seven month period. The idea that the Commission can set an unreviewable rate without following the statutory ratemaking procedures runs counter to the entire plan established by Congress in the Interstate Commerce Act.

This is ratemaking. We should not hide from that fact. The Commission candidly admits that it is making an interim rate. To suggest that the rate is "voluntary," that no rate has been set by the Commission because theoretically the pipeline companies could accept the seven month stay and not file for the interim rate, exalts form over substance in a way rarely countenanced by this Court. The Court, the Commission, the pipeline companies, and all parties to this proceeding know that an interim rate will have to be accepted by the respondents. Without a filed tariff, no oil can flow. No one has made the slightest suggestion in brief or oral argument that it would be either in the public or private interest for the transportation of this oil to be suspended for seven months while the Interstate Commerce Commission determines whether or not the proposed tariff is reasonable and just. *See* 43 U.S.C.A. § 1651 (Supp. 1977). We are given to understand that the rate here under consideration does not affect the price of oil at the delivery point, or the eventual price to the consuming public. Any transportation cost adjustment affects only the wellhead price of oil. Although there is almost complete identity between the affiliates which own the pipeline and those who receive the wellhead price, there are some others involved,

and the royalty to the State of Alaska and property owners varies with the wellhead price.

The argument that this is not ratemaking because it is only an interim and not a permanent rate loses force in numbers. The pipeline companies claim the difference between what they should get and what they will get under the interim rate could amount to $340,000,000. This sum is undoubtedly greater than the amount at stake in many permanent rates subject to ICC approval.

Although *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), and *United States* v. *Students Challenging Regulatory Agency Procedures* (SCRAP), 412 U.S. 669 (1973), are cited for the proposition that the grant or denial of a suspension order is not reviewable, they in fact only hold that a court has no authority at all to suspend a rate and that an ICC refusal to suspend is not reviewable under any statutory standards. They do not hold that a suspension order is unreviewable under constitutional due process standards. I would think that a suspension order in this case, where the lack of any tariff would effectively close down the Alaska Pipeline for seven months, and would eliminate any method of transporting the oil from the Alaska oil fields for that period of time, would be reviewable on a constitutional due process standard.

We are not confronted, however, with just a suspension order. The order before us is schizophrenic. It is both a suspension order *and* a ratemaking order.

This is a situation never previously confronted by the courts. In most situations, if a new rate is submitted to the ICC and the agency chooses to suspend it, this merely means that the carrier involved will continue to charge the rates already in existence. Thus the ICC need not take further action to ensure that the carrier can stay in business and collect charges that at least at one time were assumed to be reasonable, during the seven month period. Here, however, the Commission was faced with a brand new

entity. The Trans-Alaska Pipeline System had no pre-existing rate schedule when it filed its "new" rate with the ICC. Thus, after deciding to suspend the filed rate, the ICC was faced with a situation which left no legal rate in effect for the seven month period. Unwilling to allow the pipeline to shut down, the Commission had to promulgate what is a "second" order, a ratemaking order.

Rate setting orders are clearly reviewable under the statute. Therefore I would not review the possible legality of just a suspension order here. I would accept this case for what it is: an attempt by the Commission to do two things, the first of which it would not do had it not the power to do the second. There is no indication in anything before us that the Commission would suspend the proposed tariff if it could not set an interim rate. Thus I would not reach the constitutional considerations that might demand review of a suspension order alone in this unique situation. There is no indication that the Commission would follow such a course. Its claimed authority to do so becomes merely the theoretical exercise of power onto which it hangs its ability to set an interim rate.

So I would assume without deciding that the Commission has the power to suspend the initial rate and go to the question of whether it can set the interim rate in the manner done here. If the interim rate cannot stand, I would send the case back to the Commission for whatever action it wishes to take within the confines of its legal authority. If it chooses to suspend without an interim rate, then on review a court could consider whether that action alone under the circumstances of this case can withstand the due process requirements of the Constitution. Or, if it chooses to arrive at some interim rate through procedures that have some resemblance to the ratemaking procedures which Congress had required, that too could be reviewed. However, I do not think that in order to decide the case before us we need to make any definitive decision as to whether an initial rate

suspension alone, under the facts of this case, would be legal, or whether the Commission can ever set interim rates in connection with a rate suspension. All I would now hold is that the Commission has no authority to do what it did here.

United States v. *Chesapeake & Ohio R.R.*, 426 U.S. 500 (1975), is the only controlling authority relied upon for the proposition that interim ratemaking is a necessary power under the suspension authority. In deciding that interim ratemaking is unreviewable, the majority opinion completely overlooks the fact that the Supreme Court considered the "conditions" imposed on the proposed tariff there to be reviewable.

> In this Court, Chessie has argued that . . . the application of the Commission's action to it is arbitrary and capricious. . . . Since the District Court held that the Commission did not have the power to impose conditions on the refiling of the tariff, it did not address this question. Chessie, if it chooses, may raise the matter on remand in the District Court.

426 U.S. at 515. To distinguish the point on the ground that in *Chessie*, the rate was permanent, must also distinguish the case beyond support for the proposition espoused in the case at bar.

This case is factually and legally different from *Port of New York Authority* v. *United States*, 451 F.2d 783 (2d Cir. 1971), relied upon by the majority. There the initial decision had been made to suspend the effective date of the proposed increase in tariffs. There was a tariff in effect after suspension, one which had already been determined to be reasonable either through Commission action or lack of complaint. The suspension order was concededly within the sole discretion of the Commission, and *all* that was involved was timing. The Commission offered to let the carrier collect an interim increase, if it chose to do so. For two reasons that case is not helpful here.

First, in that case, there was a good faith suspension order of the rate increase which did not cut off services. Here there is *no* indication that the Commission would suspend the tariff and consequently cause a seven month delay in service. In fact, we are told that in oral argument before the Commission, the director of the Commission's Bureau of Investigation and Enforcement indicated the owners of the pipeline might be subject to civil or criminal penalties if they did not file for these "voluntary" interim rates. Such view would dispel any thought that the public interest required a rate suspension. This is pointed out not to suggest that a suspension order would be reviewable under the statutory public interest standard, but only to emphasize that the Commission has made no such decision upon which to hang the *Port of New York Authority* holding.

Second, the pipeline companies' choice is not whether to adhere to present rates for seven months, or accept an interim increase, as was the case in *Port of New York Authority*, but whether to do business at all, or accept an interim rate. This does not make acceptance or rejection of the interim rate the viable choice that was available in that case.

The interim rate being reviewable, the next question is whether it can stand. Even if the Commission is permitted some leeway, and allowance is made for the fact that it "pursued a more measured course and offered an alternative tailored far more precisely (than a simple suspension) to the particular circumstances presented," *Chessie*, 426 U.S. at 514, the manner of arriving at the interim rate was beyond the most liberal reading of its statutory authority.

Congress has set well-established limits on the ICC's power to make rates. First, historically, the ICC did not have ratemaking power. It could set aside a rate as being unreasonable, but the Supreme Court found no implied power to set a reasonable rate. *ICC* v. *Cincinnati, New*

Orleans & Texas Pacific Ry., 167 U.S. 479 (1897). Only nine years later did Congress amend the Act to give the ICC power to set maximum rates, Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 689, and not until 1920 was it given power to set minimum rates, Act. of Feb. 28, 1920, ch. 91, § 418, 41 Stat. 484.

Second, the ICC has the power to set rates *only after* it has determined that a proposed rate is unreasonable. That principle has been reiterated in several cases which indicate that it is the carriers who have the right to propose initial rates. *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89 (1913) ("Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order." 227 U.S. at 92). *See also New York* v. *United States*, 331 U.S. 284 (1947); *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 522 (1923); *Southern Pacific Co.* v. *ICC*, 219 U.S. 433 (1911); *ICC* v. *Chicago Great Western Ry.*, 209 U.S. 108, 118-119 (1908).

Third, a proposed rate can be found unreasonable *only after* a full hearing. *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932) ("The legal standards governing the action of the Commission in determining the reasonableness of the rates are unaltered. In the discharge of its duty, a fair hearing is a fundamental requirement.") The courts have consistently held that a finding by the ICC of unreasonableness of the rate proposed by the carrier must be supported by substantial evidence on the record as a whole. *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973); *Western Paper Makers' Chemical Co.* v. *United States*, 271 U.S. 268, 271 (1926); *Skinner & Eddy Corp.* v. *United States*, 249

U.S. 557, 562 (1919); *Archer Daniels Midland Co.* v. *United States*, 301 F. Supp. 328 (D. Minn. 1969) (3-judge court); *Atchison, Topeka & Santa Fe Ry.* v. *United States*, 282 F. Supp. 430, 434 (D. Kan. 1968) (3-judge court).

Last, the ICC can establish a rate only after a *full evidentiary hearing. Atchison, Topeka & Santa Fe Ry.* v. *United States*, 284 U.S. 248, 262 (1932); *ICC* v. *Louisville & Nashville R.R.*, 227 U.S. 89, 93 (1913). That hearing requirement is not satisfied by the "brief and informal hearing" which accompanies a suspension order. *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 672 (1963). The case for strict enforcement of the hearing requirement is particularly strong because this rate applies to so few companies, and the administrative inconvenience of multiple parties which sometimes justifies lowered procedural standards is not present. *Compare Londoner* v. *Denver*, 210 U.S. 373 (1908) (individual property assessment without hearing invalid) with *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915) (city-wide revaluation does not require individual adjudication). Even in the multi-party rate cases, administrative hearings have withstood attack only when the agency granted adequate notice and opportunity to comment both on the original rate proposal and on the comments made by others. *See Shell Oil Co.* v. *FPC*, 520 F.2d 1061, 1074-1076 (5th Cir. 1975), *cert. denied sub nom., California Co.* v. *FPC*, 426 U.S. 941 (1976).

In this case where is the finding of unreasonableness of the proposed rate on an evidentiary record, and where is the record to support the interim rate? The Commission readily admits that it cannot support either finding by record evidence.

But procedural unfairness is only the beginning of the arbitrariness in this case. The real difficulty, and the problem that makes the procedural shortcuts so detrimental to the petitioners, is that Congress through the Act has provided a reasonable way to protect *all* parties in this pro-

ceeding against the effect of error in the proposed rate, but the Commission has, without offer of justification, ignored it in the proposed interim tariff. If the rate is determined to be too high, the carriers may be forced to refund, with interest, 49 U.S.C.A. § 15(7) (Supp. 1977), or pay back as damages, with costs and attorneys' fees, 49 U.S.C.A. § 8, an overcharge collected prior to rate determination. In other words, the parties overcharged can be made whole. If the interim rate is too low, however, the ICC program provides no means whatsoever for the pipeline to recover the difference between what it was required by the Government to charge, and what that same Government later decides would have been a reasonable rate. To have a way to protect all interests, and not take it, and subject one party to the possibility of irreparable loss, is impermissible under even the most deferential standard of judicial review.

The complainants argue that a system of refunds would produce justice at the price of delay. Even justice delayed, however, is preferable to justice forever denied. At oral argument, Commission's counsel suggested no harm had been done because the interim rate is the highest rate that could reasonably be established for the pipeline. That statement constitutes a gross prejudgment of what the ICC will do, and overlooks entirely the reviewable nature of the Commission's ultimate ratemaking action. Without a sufficient record to support a finding of anything at all, and with serious questions about the rate of return, the treatment of inflation, and allowances for depreciation, counsel would have this Court predict what Commissioners, who may not be in office now, will do on the evidence presented them, and what a court of judges, who may not be in office now, will do on review of whatever those Commissioners do.

Nor can this Court sustain the interim rate by obeisance to the expertise of the Commission. Only after a full hearing upon complaint made does the law give weight or significance to the opinion of the Commission. *Atlantic Coast*

Line R.R. v. *ICC*, 194 F. 449 (Commerce Ct. 1911). The expertise of the Commission can only be relied upon after it has exercised its expert judgment on the record before it. *See* Pedersen, *Formal Records & Informal Rulemaking*, 85 Yale L.J. 38 (1975).

Hence I would hold that the Commission had no authority to set in the way it did the interim rate which was forced upon the carriers. I would set aside that proposed interim rate for these reasons: *first*, the Commission did not even attempt to follow congressionally mandated procedures for setting rates; *second*, without some specific finding of unreasonableness in the proposed rate, it appears arbitrary not to follow the statutory plan by which all parties could be protected against any eventual rate determination, and to follow a course which would cause irreparable damage to the pipelines if their position is eventually sustained; *third*, the interim tariff itself appears to be based on a rate of return more akin to that of corporate bonds than to the speculative risks of equity capital, a rate arrived at without sufficient supportive evidence concerning the speculative nature of these investments or the appropriate rate therefor.

I would set aside the Commission's Order of June 28, 1977 and remand the case to the Commission for further consideration consistent with its statutory authority.

APPENDIX B

June 29, 1977

(SERVICE DATE JUNE 28, 1977)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 28th day of June, 1977.

INVESTIGATION AND SUSPENSION DOCKET No. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

No. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

Initial rate tariffs have been filed by eight pipeline companies, proposing to operate as common carriers of crude petroleum over the Alaska Pipeline System.

Protests and petitions for suspension of the tariffs have been filed by the United States Department of Justice, the State of Alaska, the Arctic Slope Regional Corporation and our Bureau of Investigations and Enforcement. These pleadings seek to invoke our power under section 15(7) of the Interstate Commerce Act (1) to enter upon a hearing concerning the lawfulness of the tariffs and (2) pending the hearing and decision, to suspend the operation of the tariffs for a period no longer than seven months. Replies to the protests have been filed by each of the eight carriers.

The tariffs are identified in Appendix 1 to this order. As noted therein, the various rules contained in the tariffs have already been placed under investigation by Commis-

sion order dated June 17, 1977, No. 36611. Consideration of the tariff rates, however, was deferred to the present order. The rates per barrel proposed by the respective companies are as follows:

Amerada Hess Pipeline Corporation	$6.44
Arco Pipe Line Company	6.04
BP Pipelines Inc.	6.35
Exxon Pipeline Company	6.27
Mobil Alaska Pipeline Company	6.31
Phillips Alaska Pipeline Corporation	6.22
Sohio Pipe Line Company	6.16
Union Alaska Pipeline Company	6.09

With respect to these rates, we have given careful consideration to the protests, and to the carriers' replies. In addition, we have heard oral argument by the parties. It is our conclusion that a formal investigation concerning the lawfulness of the proposed rates should be instituted pursuant to sections 15(1) and 15(7) and that because of the close interrelationship of the rate filings and the applicable rules and regulations, they should be considered in the same proceeding. We further conclude that such rates should be suspended, without prejudice to the filing of interim rates, during the suspension period.

In reaching these conclusions, we have considered the following issues: (1) whether an investigation should be instituted; (2) whether the proposed rates can and should be suspended; (3) whether interim rates can and should be authorized; (4) what level of interim rates should be authorized; and (5) what conditions should be attached to the acceptance of interim rate filings.

The institution of an investigation.

Section 15(7) of the act empowers the Commission to enter upon a hearing concerning the lawfulness of a filed tariff stating a new rate or charge. In order for a rate to

be lawful, a primary requirement is that it be just and reasonable (section 1(5)). The act sets forth other requirements as well, and if an investigation is instituted, any and all aspects of the lawfulness of the rate may be considered. However, the chief question raised by the protests is whether the proposed rates are just and reasonable.

Protestants contend that the filed rates would provide excessive profits, whether compared with a traditional rate of return on valuation or with the carriers' capital costs. They also contend that the cost data provided by the carriers is overstated.

The carriers reply that their rates were computed to allow a 7 percent return on valuation, as contemplated in a 1941 consent agreement between the Justice Department and a number of shipper-owned pipelines (*United States* v. *Atlantic Refining Co.*, C.A. No. 14060, D.D.C. decided December 23, 1941). They also assert that the standards used by protestants are unrealistic in that they do not recognize that the carriers are able to maintain high levels of debt financing only because such debt is guaranteed by the parent oil companies. The carriers argue that, without such guarantees, they would have to resort to a larger amount of equity financing, and their overall capital costs would be higher than the amounts recognized by protestants. The carriers also deny that their cost data is overstated. However, they do not object to a formal investigation of the filed rates.

For reasons set forth below, we do not accept the 1941 consent decree as a standard of reasonableness under the Interstate Commerce Act. Moreover, while there may be merit to the carriers' contentions that the standards used by protestants do not cover their true costs of capital, this is a matter that cannot be resolved until a more complete record is developed. Finally, evidentiary hearings will be necessary to develop acceptable cost data for use in applying whatever measures of reasonableness are found to be

appropriate. Therefore, we conclude that there has been a sufficient showing of probable unlawfulness to warrant the institution of a formal investigation concerning the proposed rates.

The suspension of the proposed rates. Some of the carriers argue that the Commission is without power to suspend initial rates. They rely on numerous references in legislative history and past cases to exercise of the suspension power in instances of "increased" rates. They rely on such references to conclude that the power of suspension does not apply to initial rates. However, the reason that the suspension powers are usually discussed in the context of increased rates is clear: the vast majority of rate proceedings involve situations where increases in existing rates are at issue.

We see no basis in the sources cited for concluding that we may not suspend initial rates. If this were the Congressional intention, we believe that it would have been explicitly stated. It was not so stated, and the carriers have been unable to cite any direct authority for their position.

It is stated in section 15(7) that the Commission is authorized to enter upon a hearing concerning "any schedule stating a new individual or joint rate, fare, or charge." Pending this hearing and decision, the Commission may suspend, for up to seven months, the schedule being investigated. In *Rail-Water, Grain in Bulk, Mo., Ill., and Ind., to Buffalo,* 321 I.C.C. 564, 566 (1963), it was said that the term "new rate" in section 15(7) encompasses "both changed and initial" rates.

Similar suspension powers pertaining to other modes of carriage are contained in sections 216(g), 218(c), 307(g), and 406(e) of the act. In each of these sections, there is "grandfather" language making the provisions inapplicable to "initial" rates filed on or before a certain date. By implication, then, the investigation and suspension provisions *are* applicable to initial rates filed after such date.

As noted, if it were intended to exclude initial rates from the suspension power of section 15(7), one would expect specific language to this effect. No such language appears. Accordingly, we have no doubt that the suspension power is applicable to initial rates.

The carriers also question whether, even if the suspension power is applicable, we should exercise it here. They argue that protestants would not be harmed by allowing the proposed rates to go into effect, inasmuch as refunds or reparations would be available if the investigation should show that the filed rates are too high.

Protestants, however, do not consider the possibility of refunds to be adequate protection. The Arctic Slope Regional Corporation, which represents Alaskan Natives, notes that the longer it must wait for its share of royalty revenues (which are adversely affected by high transportation rates), the less value such revenues will have. Protestants also argue that the maintenance of pipeline rates at too high a level would act as a deterrent to the use of the pipeline by independent oil producers.

Although we recognize that the refund remedy is available, we do not believe that the rates can be allowed to go into effect without suspension, when, as here, the protestants have made a showing or [sic] probable unlawfulness. Moreover, as noted by protestants, the maintenance of excessively high rates could act as an obstacle to the use of the pipeline by non-affiliated oil producers, and would also delay the Alaskan interests in obtaining revenues that depend upon the wellhead price of the oil. Under the circumstances, we have concluded that the proposed rates, as filed, should be suspended, pending our investigation, for the statutory period of 7 months.

The authorization of interim rates. Protestants seek to have the Commission name specific rates that may be charged by each carrier while the investigation is being

conducted. The carriers, however, contend that the Commission has no power to do so. They argue that the specification of interim rates would be a rate prescription within the meaning of section 15(1) of the act, and that we are empowered to take such action only after a full hearing.

We see no basis for considering such action to be a prescription of rates.[1] We may authorize interim rates without requiring that the rates proposed in the tariffs be cancelled, and without precluding the proposed rates from taking effect at the end of the 7-month suspension period if our investigation is not then completed (subject, however, to a refund provision as hereafter described). These interim rates would not be intended to have permanent effect, but would merely be interim rates that we would allow to be collected during the suspension period. Such rates, if filed, remain subject to Commission scrutiny and are not to be considered as prescribed within the meaning of the decision in *Arizona Grocery* v. *Atchison, T. & S.F. Ry., Co.*, 284 U.S. 370.

We believe that the power to allow interim rates is inherent in the suspension power. Without it, the Commission could be faced with the choice of allowing the carriers to operate at any rate they choose, whether or not lawful, or precluding carrier operations altogether. We do not believe

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[1] *Moss* v. *C.A.B.*, 430 F. 2d 891, is clearly distinguishable. That case involved ex parte meetings and the substitution by the Board of "a complete and innovative scheme for setting all passenger rates for the Continental United States," with an indication that such a filing would not be suspended. In *Moss*, the court noted that unlike the Interstate Commerce Act, the Federal Aviation Act has no provision for reparations, thus rendering the procedural safeguards of the Aviation Act the public's sole defense. The court also pointed out its view might have been different if interim action were involved. In the present TAPS proceedng, both the proposed rates and any interim rates which may be filed *will* remain subject to full investigation. See also *Consolidated Edison Co. of New York* v. *F.P.C.*, 512 F. 2d 1332, 1340, distinguishing *Moss* v. *C.A.B.* and stressing the behind-the-scenes aspect of the *Moss* case.

that Congress could have intended our powers to be so inflexible. If the suspension power did not include the discretion to permit interim rates, it would be a substantially less satisfactory tool for serving the public interest.

Having concluded that we possess the power to authorize interim rates, we have no hesitation about taking such action in the present circumstances. If we were to suspend the proposed rates without allowing interim rates, the result would be to preclude the carriers from commencing their operations during the suspension period. Such a result would be contrary to the interests of all concerned.

The level of interim rates. We believe that the proper question to be asked concerning our action in these proceedings is not whether we have the discretion to authorize an interim rate. Rather, the question should be whether we have exercised such discretion in a reasonable manner.

The key to a proper exercise of our discretion in this situation lies in recognizing the possible consequences of our action. We must bear in mind that the carriers may have no means of obtaining restitution if initially required to maintain too low a rate. On the other hand, a remedy by way of refunds or reparations is available to persons injured by the charging of a rate that is ultimately found to be too high. In these circumstances, the reasonable approach to determining an interim rate is (1) to accept the basic data supplied by the carriers and (2) at the same time to require a refund provision in the event that such amounts are ultimately determined to exceed a reasonable level. This, then, is the course that we shall follow.

The process of arriving at an acceptable interim rate requires two steps. The first is to define the basic carrier data that will be employed, and the second is to perform computations using such data.

The data that we will employ is set forth in Appendix 2. For the purposes of the present decision, we have, for the

most part, employed the figures supplied by the carriers. Appendix 2 displays this data both in total dollars and in dollars per barrel. The conversion to per-barrel figures is based on the assumption that the normal traffic volume for the beginning years will be 438 million barrels a year (1.2 million barrels a day), and that this number of barrels will be apportioned among the carriers according to their respective ownership shares in the pipeline.

Of the items set forth in Appendix 2, substantial questions have been raised at this stage of the proceeding particularly with regard to removal and restoration costs and depreciation. Removal costs are the costs expected to be incurred at the end of the useful life of the pipeline in order to meet environmental requirements. According to the Alyeska Pipeline Service Company, these costs will amount to about $1.049 billion in 1977 dollars. Some of the carriers propose to simply set aside one twenty-fifth of their total share of this amount each year for 25 years. Others propose more detailed computations to inflate the removal costs to dollar costs for the year 2002, and to allow for compounded interest on the yearly accruals. The protestants, on the other hand, seek to reduce the yearly removal charges by requiring that they be amortized over a period longer than 25 years.

With respect to depreciation charges, the carriers uniformly propose a 25-year service life, on the basis that known recoverable reserves on the North Slope are expected to be depleted in terms of economic recovery in 25 years. Protestants propose that service lives as long as 35 years be required, on the basis that additional oil fields exist on the North Slope that are likely to extend the pipeline's useful life and that even the present reserve may have a longer life than 25 years.[2]

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[2] It should be noted that at oral argument several protestants did not dispute the use of 25 years at the suspension level.

Both of these issues will receive substantial attention during our formal investigation. However, at this stage of the proceedings, the data presented concerning additional reserves is of a somewhat uncertain nature. We do not deem this data sufficient to warrant a reduction in the amount allowed for depreciation for the purposes of determining the lawfulness of the proposed rates at the suspension level. By the same token, we will not, at this time, compute removal charges over an amortization period of more than 25 years.

For removal costs, we have used the same per-barrel allowance for each carrier, because we see no basis for cost differences among the carriers on this item. Our allowance is based on a simple amortization without inflation or discounting. While this approach may somewhat understate the amounts that need to be accrued, the magnitude of the discrepancy would not be great in terms of the overall tariff computation. It may well be outweighed by overstatement in the depreciation charges.

An additional issue is raised by protestants concerning the investment and valuation figures. It is their contention that these figures are affected by excessive construction costs. Needless to say, this issue will be a major focus of our formal investigation. However, as the protestants themselves concede, this is not a matter that can be properly dealt with at the present stage of the proceeding. Accordingly, the investment figures provided by the carriers will be used at this time. Our valuation staff has used the same data in providing valuation figures for present purposes.

In one aspect, the investment data shown on Appendix 2 differs from figures supplied by certain carriers in that it does not include an amount for working capital. Not all of the carriers reported working capital as part of their investment. Those that did appear to have used no consistent standard. For this reason, and because a satisfactory basis for judging the carriers' working capital needs has not been

shown, we have omitted it from the investment figures.[3] We believe that our action in this respect is more than compensated by our liberality in not averaging down the investment figures for depreciation over the first few years.

Having the basic data at hand, we turn now to the question of rate computation.

In justifying the filed tariff rates, the carriers contend that the proposed rates are merely sufficient to cover expenses and interest and to allow an after-tax return on equity equal to 7 percent of their valuation. They consider this method of gauging a return on equity to be permissible since it is used in the 1941 consent agreement between the Justice Department and a large number of shipper-owned pipelines.

However, the consent decree standard has never been employed in a Commission proceeding as the test of reasonableness of rates. Its sole legal status is as a limit on the amount of dividends that pipelines may pay to shipper owners without risking prosecution under the Elkins Act for illegal rebates. Moreover, as a standard of reasonableness, it has nothing to recommend it from a conceptual standpoint. Although valuation is a measure of the entire investment, the consent decree standard allows a return on valuation to be used entirely to compensate one segment of the capital invested. Such a standard can have no relationship, except by coincidence, to the carriers' true capital costs. As shown in Appendix 3, the filed rates would produce returns on equity ranging from 31 percent to 96 percent. Even if the carriers had a lower capital structure of 60 percent debt and 40 percent equity, the proposed rates would provide returns on equity ranging between 16.8 percent and 20.6 percent. The Department of Justice suggests 14 percent as a suitable number for use as the cost of equity

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[3] An allowance for working capital has, however, been included in the staff evaluation estimates reflected in Appendix 2.

capital at this stage of the proceeding. We agree that this would be a suitable figure for present purposes. Accordingly, it can be seen that the filed tariff rates would produce returns exceeding capital costs, even where the carriers' own expense and investment data are accepted.

Inasmuch as the carriers' justification does not appear satisfactory, we must next consider what standards would be appropriate based on our own precedents. As we noted in No. 35533, *Petroleum Products, Williams Brothers Pipe Line Company,* —— *I.C.C.* —— (1976), the standards we have applied in the past have been an 8 percent return on valuation for crude oil pipelines and 10 percent on valuation for petroleum products pipelines.

At the outset, we have questions about the appropriateness of an 8 percent return in this instance, where annual interest rates generally exceed 8 percent. The small margin of earnings in excess of interest that would result is demonstrated in Appendix 4. As may be seen, rates computed on this basis would range from $3.74 for BP to $4.16 for Exxon. Further study of this table shows that five of the eight carriers would have returns on equity of 10 percent or less under this standard, and returns for some would be lower than 3 percent. Such a return would be unreasonably low.

It should be noted that the 8 percent on valuation standard arose in the early 1940's, when capital costs were substantially lower than they are today. It could continue to provide a substantial return on original investment to established carriers, whose valuations have risen well above their actual investment because of inflation. In the case of the TAPS carriers, however, their property was constructed so recently that valuation is little higher than actual cost, and an 8 percent return on valuation becomes quite deficient.

The question arises, then, as to whether the Commission can permissibly depart from its previous standards in these

proceedings. The answer lies in the fact that, whatever standards we use, the earnings allowed to the carriers must comply with governing judicial requirements. The controlling standard, set forth in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944), is that a regulated firm must be allowed enough revenue not only for operating expenses, but also for the capital costs of the business. Such revenue most cover service on the debt and a return on equity sufficient to attract capital. [See also section 15a(2).]

For the purposes of the present decision, we have determined that the standard of a 10 percent return on valuation for petroleum products pipelines is appropriate for the TAPS carriers. Our selection of the 10 percent return on valuation standard is based primarily on two factors. One is that the magnitude and inherent attributes of the TAPS project produce a higher risk factor than is normal in crude oil pipeline operations. Many of the construction features are being tested for the first time. Geographic terrain, environmental and temperature problems, possible earthquakes, vulnerability to sabotage, future oil pricing policies, and regulatory uncertainty are among the factors to be considered. Moreover, a 10 percent return on valuation appears generally sufficient to cover estimated capital costs. As previously noted, an 8 percent return on valuation produces generally insufficient returns on equity.

As shown in Appendix 5, a 10 percent return on valuation produces for the individual carriers on their actual capital structure returns on equity ranging from 13.3 percent to 54.3 percent, with no figure for Mobil which claims to be totally debt financed. The composite return on equity is 23 percent.

While these returns on equity have been challenged by protestants, the carriers note that they have an abnormally high proportion of debt in their capital structures, which is made possible by the fact that their debt obligations are

unconditionally guaranteed by their parent oil companies. The carriers would argue that tariff rates based on 10 percent return on valuation provide a much lower return on equity with a more normal capital structure.

Although the 10 percent return on valuation appears suitable for present purposes, we stress that it is not intended to be a general standard nor to be a prejudgment of criteria to be used upon the conclusion of the investigation in these proceedings, nor is it in any way to be considered a prejudgment of the issues in Ex Parte No. 308.

Conditions for the acceptance of interim rate filings. The Bureau of Investigations and Enforcement asks that the carriers be required to produce a number of types of documents as a condition to our acceptance of interim rates. The carriers, however, contend that BIE's proposed condition is an attempt to circumvent the Commission's established discovery rules, and should not be adopted.

We have concluded not to impose the requested condition in the present order. We do not believe that such orders are a necessary subject for inclusion in an order disposing of petitions for suspension of a tariff. Any future request for orders can be handled as separate matters later, when all factors concerning the production of the requested data can be properly considered. In addition, we note that at oral argument, the carriers indicated their willingness to cooperate in the production of documents. We shall expect them to abide by this agreement.

The other condition requested by protestants pertains to possible refunds of excess charges collected under the interim rate. We recognize that even the lower interim rate levels may prove upon investigation to exceed reasonable levels. Therefore, as a condition to filing such interim rates, we will require that the carriers keep account of the amounts collected, and that they agree to refund any portion of such amounts that may ultimately be established as excessive.

Immediately prior to the oral argument on June 27, 1977, the Department of Justice filed a memorandum in reply to the responses of the carriers together with a motion for leave to file. Neither the special procedure adopted in this case nor our rules of practice contemplate replies to replies and the motion for leave to file is denied.

In the paragraphs below, the tariffs of Phillips Alaska Pipeline Corporation are not included. As noted in Appendix 1, a separate order with respect to Phillips will be issued before July 20, 1977.

Is it ordered, That the operation of the schedules authorized below be, and it is hereby, suspended, and that the use thereof in interstate or foreign commerce be deferred from June 30, 1977, and to and including January 29, 1978, except as to I.C.C. 2, published by Amerada Hess, which bears a July 1 effective date and the operation of which is suspended to January 31, 1978, unless otherwise ordered by this Commission;

I&S No. 9164

AMERADA HESS PIPELINE CORPORATION
I.C.C. No. 2

ARCO PIPE LINE COMPANY
I.C.C. No. 1030
on page 14, the rate of $6.04

BP PIPELINES, INC.
I.C.C. No. 2

EXXON PIPELINE COMPANY
I.C.C. No. 125

MOBIL ALASKA PIPELINE COMPANY
I.C.C. No. 2

SOHIO PIPE LINE COMPANY
I.C.C. No. 742
on the title page, the rate of $6.16

UNION ALASKA PIPELINE COMPANY
I.C.C. No. 2

IT IS FURTHER ORDERED, That an investigation be, and it is hereby, instituted into and concerning the lawfulness of the rates contained in the suspended schedules, as aforesaid, as well as the interim schedules authorized to be filed, pursuant to section 15(1) and section 15(7), with a view to making such findings and orders in the premises as the facts and circumstances shall warrant. In the event the schedules here under investigation are changed, amended or reissued, upon termination of the suspension period and the investigation not having been concluded, such changed, amended or reissued schedules will be included in this investigation.

IT IS FURTHER ORDERED, That the investigation in this proceeding shall include all matters and issues with respect to the lawfulness of the said rates under the Interstate Commerce Act.

IT IS FURTHER ORDERED, That the named carriers be, and they are hereby, authorized to file, upon not less than one day's notice, interim rates not exceeding the following amounts:

Amerada Hess Pipeline Corporation	$4.85
Arco Pipe Line Company	4.91
BP Pipelines Inc.	4.68
Exxon Pipeline Company	5.10
Mobil Alaska Pipeline Company	4.84
Sohio Pipe Line Company	4.70
Union Alaska Pipeline Company	4.89

subject, however, to the condition that (1) the interim tariffs contain a refund provision to the effect that if the

rates charged exceed the rates subsequently authorized or prescribed by the Interstate Commerce Commission, the carriers will refund the difference between the rates charged and any rates which may subsequently be authorized or prescribed by the Interstate Commerce Commission with interest computed in accordance with section 15(8)(e) of the act, added by the Railroad Revitalization and Regulatory Reform Act of 1976; and (2) that the carriers file (effective on not less than 1 days [sic] notice) a similar refund provision applicable to the original proposed rates. Although that section does not apply to pipelines, it represents the latest expression of Congressional interest, and the Commission's notice of April 14, 1977 indicated its applicability to all carriers under Part I. It should also be noted that the carriers at the oral argument expressed assent to an even higher rate of interest in the event of an investigation without suspension. Under the circumstances, we believe interest computed in accordance with section 15(8)(e) would be fair to all parties.

AND IT IS FURTHER ORDERED, That a copy of this order be filed with the schedules in the office of the Interstate Commerce Commission, and that copies hereof be served upon the carriers parties to the said schedules, and that the said carriers be, and they are hereby, made respondents to this proceeding.

By the Commission. (Commissioner Brown approves the order except insofar as it denies the motion of the Department of Justice for leave to file a response to the carrier's responses).

(SEAL)

H. G. HOMME, JR.,
Acting Secretary.

Appendix 1

INITIAL TARIFFS APPLICABLE TO THE TRANS ALASKA PIPELINE SYSTEM

Carrier	*Tariff No.*	*Filing Date*	*Effective Date*
Amerada Hess Pipeline Corporation	I.C.C. No. 1 (rules)	June 1, 1977	July 1, 1977
	I.C.C. No. 2 (rate)	June 1, 1977	July 1, 1977
Arco Pipeline Company	I.C.C. No. 1030	May 27, 1977	June 30, 1977
BP Pipelines, Inc.	I.C.C. No. 1 (rules)	June 3, 1977	June 20, 1977
	I.C.C. No. 2 (rate)	June 3, 1977	June 30, 1977 [1]
Exxon Pipeline Company	I.C.C. No. 124 (rules)	June 8, 1977	June 20, 1977
	I.C.C. No. 125 (rate)	June 8, 1977	June 30, 1977
Mobil Alaska Pipeline Company	I.C.C. No. 1 (rules)	June 10, 1977	June 20, 1977
	I.C.C. No. 2 (rate)	June 10, 1977	June 30, 1977 [1]
Phillips Alaska Pipeline Corporation	I.C.C. No. 1 (rules)	June 20, 1977	July 20, 1977 [2]
	I.C.C. No. 2 (rate)	June 20, 1977	July 20, 1977 [2]
Sohio Pipeline Company	I.C.C. No. 742	June 3, 1977	July 30, 1977 [1]
Union Alaska Pipeline Company	I.C.C. No. 1 (rules)	June 15, 1977	June 30, 1977
	I.C.C. No. 2 (rate)	June 15, 1977	June 30, 1977

Tariff rules filed by all of the named carriers except Phillips were placed under investigation in No. 36611 by order of the Commission served June 17, 1977. Consideration of the rates filed by those carriers was deferred to the present order.

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[1] Postponed from June 20, 1977.

[2] Because of the later effective date of these tariffs, the time for filing protests and replies to them has not yet expired. The question of their suspension or investigation will be the subject of a separate order by the Commission, to be issued prior to July 20, 1977.

Appendix 2 I&S No. 9164

BASIC CARRIER DATA
(000 omitted)

		AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Operating Costs	Total	6,500[1]	90,250[1]	64,757[1]	81,900[1]	19,699[1]	6,139[1]	135,200[1]	6,499[1]	410,944
	Per Barrel	.989	.981	.933	.935	.899	.844	.926	.894	.938
Removal Costs	Total	629[2]	8,812[2]	6,646[2]	8,392[2]	2,098[2]	697[2]	13,989[2]	697[2]	41,960
	Per Barrel	.096	.096	.096	.096	.096	.096	.096	.096	.096
Investment	Total	144,031[3]	1,931,850[3]	1,467,240[3]	1,837,000[3]	459,500[3]	147,369[3]	3,138,500[3]	142,985[3]	9,268,475
	Per Barrel	21.923	21.003	21.148	20.970	20.982	20.268	21.492	19.665	21.161
Depreciation	Total	5,754[4]	77,247[4]	59,794[4]	73,700[4]	18,080[4]	6,061[4]	126,200[4]	5,750[4]	372,586
	Per Barrel	.876	.840	.862	.841	.826	.834	.864	.791	.851
Debt	Total	116,957[5]	1,814,887[5]	1,255,947[5]	1,431,250[5]	459,500[5]	120,000[5]	2,707,500[5]	128,439[5]	8,034,480
	Per Barrel	17.802	19.731	18.103	16.338	20.982	16.504	18.541	17.665	18.344

BASIC CARRIER DATA (Continued)

Interest	Total	11,288[6]	140,200[6]	118,889[6]	114,500[6]	32,674[6]	10,125[6]	252,480[6]	9,369[6]	689,525
	Per Barrel	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Interest Rate		9.651%[7]	7.725%[7]	9.466%[7]	8.000%[7]	7.111%[7]	8.438%[7]	9.325%[7]	7.295%[7]	8.582%
Equity	Total	27,074[8]	116,963[8]	211,293[8]	405,750[8]	—0—[8]	27,369[8]	431,000[8]	14,546[8]	1,233,995
	Per Barrel	4.121	1.272	3.045	4.632	—0—	3.764	2.951	2.001	2.817
Valuation	Total	148,900[9]	2,036,000[9]	1,541,200[9]	1,937,500[9]	484,500[9]	158,200[9]	3,271,400[9]	155,900[9]	9,733,600
	Per Barrel	22.664	22.135	22.214	22.118	22.123	21.758	22.402	21.441	22.223
Debt/ Equity		81.2/18.8	93.9/6.1	85.6/14.4	77.9/22.1	100.0/0.0	81.4/18.6	86.3/13.7	89.8/10.2	86.7/13.3

FOOTNOTES TO BASIC CARRIER DATA

Amerada Hess

1. Reported in undated statement submitted by Amerada Hess entitled "General Assumptions for Calculating TAPS Tariff as of May, 1977."
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Amerada Hess' ownership share (1.50 percent).
3. Amerada Hess' share (1.50 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Amerada Hess' capitalized construction interest ($22,670,500) and capitalized overhead costs ($1,735,400) as reported by letter from R.K. Stafford dated May 13, 1977.
4. Reported in letter from R. K. Stafford dated June 1, 1977.
5. Reported in "General Assumptions" statement.
6. Reported in "General Assumptions" statement.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Arco

1. Reported in letter from J.D. Wessling dated June 1, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Arco's ownership share (21 percent).
3. Arco's share (21 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Arco's capitalized construction interest ($257,100,000),

as reported in letter from J.D. Wessling dated June 1, 1977.

4. Reported in letter dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in June 1, 1977 letter.
7. Weighted average interest rate of debt issues shown in a letter from J.D. Wessling dated June 2, 1977.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

BP

1. Reported in BP's submission of June 15, 1977, in explanation of filed tariff rates.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by BP's ownership share (15.84 percent).
3. BP's share (15.84 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus BP's capitalized construction interest and overhead costs ($204 million), with the latter as reported in BP's submission of June 15, 1977.
4. Reported in BP's submission of June 15, 1977.
5. Investment less equity.
6. Reported in a letter from P.H. Jones dated May 27, 1977.
7. Interest divided by debt.
8. Reported in a letter from P.H. Jones dated June 14, 1977.
9. Staff estimate based on reported investment figures.

Exxon

1. Reported in Appendix A to Exxon's reply to protests.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Exxon's ownership share (20 percent).
3. Exxon's share (20 percent) of Alyeska investment ($7,959 million for facilities, plus $16 million for land), plus Exxon's capitalized construction interest ($242 million), with the latter as reported in a letter from J.D. Sturtevant dated March 21, 1977.
4. Reported in a letter from J.D. Sturtevant dated June 1, 1977.
5. Interest divided by interest rate.
6. Reported in Appendix A to Exxon's reply to protests.
7. Reported in Appendix A to Exxon's reply to protests.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Mobil

1. Reported in a letter from C.R. Thompson dated May 27, 1977.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Mobil's ownership share (5 percent).
3. Mobil's investment, including capitalized construction interest ($57.7 million) and capitalized overhead costs ($3.2 million) as reported in a letter from C.R. Thompson dated April 29, 1977.
4. Reported in letter dated May 27, 1977.
5. Debt presumed to be 100 percent of investment. Data filed by Mobil gives no indication of equity financing.

6. Reported in letter dated May 27, 1977.

7. Interest divided by debt.

8. Investment minus debt.

9. Staff estimate based on reported investment figures.

Phillips

1. Reported in a letter from James Mullen dated July [sic; June] 20, 1977.

2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Phillips' ownership share (1.66 percent).

3. Phillips' share (1.66 percent) of Alyeska investment ($7,959 million for facilities plus $16 million for land), plus Phillips' capitalized construction interest ($14,944,000) and capitalized overhead costs ($40,000), with the latter items as reported in letter of June 20, 1977. Working capital ($1,480,000) excluded.

4. Reported in undated statement entitled "Phillips Petroleum Company—Estimate of Expenses."

5. Reported in letter of June 20, 1977.

6. Reported in letter of June 20, 1977.

7. Interest divided by debt.

8. Investment minus debt.

9. Staff estimate based on reported investment figures.

Sohio

1. Reported in a letter from J.T. Boltacz dated June 13, 1977.

2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Sohio's ownership share (33.34 percent).

3. Sohio's investment (3,138.5 million) as reported in letter dated June 13, 1977. Working capital ($13 million) excluded. Subtracting Sohio's share of Alyeska investment would indicate $479,635,000 as capitalized construction interest and overhead costs.
4. Reported in letter dated June 13, 1977.
5. Reported in letter dated June 13, 1977.
6. Reported in letter dated June 13, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Union

1. Reported in a letter dated May 27, 1977, from E.J. Takach.
2. Estimated Alyeska removal cost ($1,049 million) divided by 25 years, multiplied by Union's ownership share (1.66 percent).
3. Union's share (1.66 percent) of Alyeska investment ($7,975 for facilities plus $16 million for land), plus Union's capitalized construction interest ($10.6 million), with the latter as reported in a letter from David M. Schwartz dated June 14, 1977.
4. Reported in letter dated May 27, 1977.
5. Reported in letter dated June 14, 1977.
6. Computed from debt description in letter dated June 14, 1977.
7. Interest divided by debt.
8. Investment minus debt.
9. Staff estimate based on reported investment figures.

Appendix 3

EFFECTS OF FILED TARIFF RATES

I&S No. 9164

	AMERADA HESS	ARCO	BP	EXXON	MOBIL
Revenue (Rate)	6.440	6.040	6.350	6.270	6.310
Less:					
Operating	.989	.981	.933	.935	.899
Depreciation	.876	.840	.862	.841	.826
Removal Costs	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492
Less Taxes	1.461	1.375	1.452	1.635	1.585
Return on Equity	1.300	1.224	1.293	1.456	1.412
Percentage Returns:					
On Equity	31.5%	96.2%	42.5%	31.4%	(no equity)
On Total Investment	13.8%	13.1%	14.2%	13.2%	13.8%
On Valuation	13.3%	12.4%	13.5%	12.5%	13.1%

	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	6.220	6.160	6.090	6.211
Less:				
Operating Costs	.844	.926	.894	.938
Depreciation	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096
Less Interest	1.393	1.729	1.289	1.574
Less Taxes	1.615	1.346	1.598	1.456
Return on Equity	1.438	1.199	1.422	1.296
Percentage Returns:				
On Equity	38.2%	40.6%	71.1%	46.0%
On Total Investment	14.0%	13.6%	13.8%	13.6%
On Valuation	13.0%	13.1%	12.7%	12.9%

Appendix 4

TARIFF COMPUTATION

Allowing 8 Percent Return on Valuation—Actual Capital Structure

	AM HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (RATE)	3.881	3.965	3.739	4.160	3.903	3.905	3.749	3.975	3.892
Less:									
Operating Cost	.989	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Tax	.107	.277	.071	.519	.312	.390	.071	.479	.229
Return on Equity	.095	.247	.063	.462	.278	.348	.063	.426	.204
Percentage Returns:									
On Equity	2.3%	19.4%	2.1%	10.0%	(no equity)	9.2%	2.1%	21.3%	7.2%
On Total Investment	8.3%	8.4%	8.4%	8.4%	8.4%	8.6%	8.3%	8.7%	8.4%
On Valuation	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%	8.0%

Appendix 5

TARIFF COMPUTATION

Allowing 10 Percent Return on Valuation—Actual Capital Structure

	AM. HESS	ARCO	BP	EXXON	MOBIL	PHILLIPS	SOHIO	UNION	TOTAL
Revenue (Rate)	4.847	4.906	4.681	5.100	4.842	4.829	4.700	4.885	4.835
Less:									
Operating Costs	989.	.981	.933	.935	.899	.844	.926	.894	.938
Depreciation	.876	.840	.862	.841	.826	.834	.864	.791	.851
Removal Costs	.096	.096	.096	.096	.096	.096	.096	.096	.096
Less Interest	1.718	1.524	1.714	1.307	1.492	1.393	1.729	1.289	1.574
Less Taxes	.616	.775	.569	1.016	.809	.879	.574	.960	.728
Return on Equity	.548	.690	.507	.905	.720	.783	.511	.855	.648
Percentage Returns:									
On Equity	13.30%	54.25%	16.65%	19.54%	(no equity)	20.80%	17.32%	42.73%	23.00%
On Total Investment	10.34%	10.54%	10.50%	10.55%	10.54%	10.74%	10.42%	10.90%	10.50%
On Valuation	10%	10%	10%	10%	10%	10%	10%	10%	10%

INTERSTATE COMMERCE COMMISSION
Washington, D. C. 20423

(SERVICE DATE JUNE 29, 1977)

INVESTIGATION AND SUSPENSION DOCKET No. 9164
TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

NO. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

June 29, 1977

CORRECTION NOTICE:

The order served in these proceedings on June 28, 1977, contained certain inadvertent omissions and typographical errors. Corrections should be made as follows:

Page 1

First sentence of text—add "Trans" before "Alaska Pipeline System."

Page 2

First paragraph, last sentence—delete, and substitute the following: "However, the question raised by the protests is whether there is reason to believe the proposed rates are not just and reasonable."

Page 3

Next-to-last paragraph, fifth line--after "could act as" insert "a deterrent or".

Page 6

Last paragraph, lines 12 through 18—Delete the three sentences beginning "Even if the carriers . . ." and ending ". . . for present purposes."

Page 8

Fifth paragraph, second line—delete "under the interim rate."

Fifth paragraph, sixth line—after "amounts collected" insert "under the interim rates or the proposed rates should they become effective".

Page 9

Third further ordering paragraph, line 11—change to read: "subject however, to the condition that the carriers keep account and that (1) the interim tariffs contain".

Appendix 1

Opposite Sohio Pipeline Company, change Effective Date to "June 30, 1977".

H. G. Homme, Jr.
Acting Secretary

APPENDIX C

(Service Date Sep 27 1977)

INTERSTATE COMMERCE COMMISSION

Order

INVESTIGATION AND SUSPENSION DOCKET No. 9164 [1]

TRANS ALASKA PIPELINE SYSTEM (RATE FILINGS)

By orders of June 28, 1977,[2] and July 19, 1977,[3] we instituted investigations into the lawfulness of initial tariff rates filed by eight pipeline companies for transportation of crude petroleum over the Trans Alaska Pipeline System. We also suspended the operation of those rates for periods of seven months and authorized the filing of lower interim rates for use during the suspension period. Petitions for reconsideration of various aspects of our orders have been filed both by the pipeline companies and by parties challenging their tariffs.[4]

On petition, one or more of the carriers contend: (1) that higher interim rates should be authorized on the basis that traffic volume during the suspension period will average less than the 1.2 million barrels a day assumed in the

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[1] Embraces Investigation and Suspension Docket No. 9164 (Sub-No. 1), Trans Alaska Pipeline System (Rate Filings); Docket No. 36611, Trans Alaska Pipeline System (Rules and Regulations); and Docket No. 36611 (Sub-No. 1), Trans Alaska Pipeline System (Rules and Regulations).

[2] I. & S. No. 9164, affecing Amerada Hess Pipeline Corporation, Arco Pipe Line Company, BP Pipelines, Inc., Exxon Pipeline Company, Mobil Alaska Pipeline Corporation, Sohio Pipe Line Company, and Union Alaska Pipeline Company.

[3] I. & S. No. 9164 (Sub-No. 1), affecting Phillips Alaska Pipeline Corporation.

[4] The petitions and replies to them are identified in the appendix to this order.

Commission's orders; (2) that the yearly charges recognized for removal and restoration costs should be increased to account for inflation and taxes; (3) that a greater percentage return on valuation should be allowed; and (4) that the suspension periods for Phillips and Amerada Hess should be modified. These contentions will be discussed individually.

In our order of June 28th, we assumed that the carriers' normal traffic volume, or "throughput," for the beginning years would be 1.2 million barrels a day. We used this assumption in converting the carriers' total costs to per-barrel costs, for the purpose of finding suitable interim per-barrel rates. The carriers now seek a decrease in the assumed throughput, which would result in higher costs per barrel, and thus, higher interim rates.

The carriers do not deny that 1.2 million barrels is the amount that they reported to the Commission as their expected normal daily throughput (prior to any future expansion of pipeline capacity). However, they now take the position that, in authorizing an interim rate for a seven-month suspension period, the Commission should consider only the traffice volume expected during that period. They note that throughput during the suspension period will be lower than normal volume for two reasons: (1) there is an expected lower-volume startup period, variously estimated to last from several weeks to as long as four months, and (2) the occurrence of a fire at Pump Station 8 has imposed a substantial additional delay on the attainment of normal traffic volume.

We find insufficient basis in the petitions for modifying the throughput assumption upon which the interim rates were computed. At the time of our previous orders, we were indeed aware that there would be a startup period in which throughput would be below normal. Nevertheless, we did not consider it suitable to use the throughput level of a short initial period, such as the suspension period, as

the basis for finding per-barrel costs. The interim rates were intended to be preliminary estimates of maximum lawful rates for the services proposed in the tariff. Therefore, the cost data and the throughput assumption that we used were related to expected typical conditions of pipeline operation. The petitions shown no reason to conclude that the throughput figure used was erroneous on the basis of the data previously before the Commission.

Nor do we believe that the carriers' assertion of changed circumstances resulting from the pump station fire warrants a modification of the throughput assumption. The carriers contend that this accident will have a severe and rather long-lasting effect on throughput. In some of the petitions, it is estimated that throughput will not exceed 800,000 barrels a day during the suspension period, and may be much less. Phillips and Exxon report an estimate that daily volume will range from 617,000 barrels in August 1977 to 690,000 barrels in December 1977; Phillips further asserts that the 690,000 barrel level may not be exceeded until the third quarter of 1978.

There are two reasons why these assertions do not warrant a change in our throughput assumption. First, the risk of setbacks such as the pump station fire was taken into account when we chose the rate of return on valuation to be allowed in computing interim rates. Second, the carriers have provided no data and little explanation to support their projections of lower throughput. We do not know, for example, how much daily throughput capacity was lost specifically from the destruction of pump station 8; when pump station 8 is expected to be restored to service; why this amount of time would be required; what other factors enter into the carriers' throughput estimates; what means other than the rebuilding of pump station 8 are available to increase the throughput; whether such means will be employed, and to what effect.

In short, our prior orders were made in recognition both of an expected initial period of low throughput and of the risk of operating problems. The information subsequently submitted by the carriers is insufficient to establish circumstances very different from what we previously contemplated. Therefore, the request for use of a different throughput assumption in computing authorized interim rates will be denied.

Turning to the carriers' other contentions, the question of the appropriate allowance for removal costs was fully considered in our previous orders, as was the question of the appropriate rate of return standard for use at the suspension level. No warrant for modification of those conclusions has been demonstrated.

Amerada Hess and Phillips each seek modification of the termination dates of their suspension periods, which are later than the termination dates for the other six carriers. The tariff of Amerada Hess had a proposed effective date one day later than the others. Its tariff, like the others, was suspended for a period of seven calendar months. However, as a result of the differing lengths of the included calendar months, its suspension period extends two days beyond the others. It seeks to have its suspension period shortened by one day, to have the same number of days' duration as the others.

Phillips' tariff was filed with an effective date 20 days later than the others, and therefore its suspension period expires 20 days later. It seeks to have its suspension period shortened to expire on the same day as the others.

These requests for shortened suspension periods will be denied. The statutory seven-month suspension period was established by Congress for the protection of the public. Under present circumstances, we do not believe that the public should be deprived of that protection by the use of a shorter suspension period than the law allows. As an

incidental matter, we note that, in the June 28th order, the omission of the words "and including" from the description of the last day of the suspension period for Amerada Hess was inadvertent, and will be corrected in this order.

In addition to respondents' petitions for reconsideration, Phillips also filed a request for stay of the suspension of its tariff rate. In this pleading it argues that a refund provision without suspension would avoid harm to it while adequately protecting shippers. Arguments of this nature were fully considered in the Commision's previous orders, and no reason for modification of those conclusions has been shown. The request for stay will be denied.

It is contended by the protestants in their petitions (1) that the Commission should extend the duration of its suspension period beyond the specified seven months to the full period of the investigation, or seek legislative authority to do so; (2) that the suspension periods should be calculated from the date of readiness to provide for-hire service, rather than from the effective dates of the tariffs; (3) that the authorized interim rates should be reduced on the basis of different conclusions regarding valuation, tax allowances, and depreciation charges; and (4) that refunds should be provided for at a 10 percent rate rather than at the lower rate resulting from the application of section 15 (8)(c) of the Interstate Commerce Act.

We find no basis in protestants' petitions for modification of the conclusions in our orders. The seven-month duration of the suspension period is clearly specified in section 15(7) of the act, and is an expression of a carefully considered Congressional policy. Similarly, the date of-commencement of the suspension period is clearly indicated in section 15(7) as being the proposed effective date of the tariff. The proper standards of cost and investment for the authorized interim rate were fully considered in our previous orders, and no reason for modification of those conclusions has been demonstrated. Finally, we do

not agree that refunds should bear interest at a rate equal to the authorized rate of return on valuation, where there is no similarity in the risk characteristics of the respective use of funds. Protestants' petitions, accordingly, will be denied.

Finally, in its "response" to petitions for reconsiderations, Sohio makes the request, not previously made by any party in these proceedings, that interim rates for all of the carriers be authorized at the same level. Such a request for affirmative relief in a reply pleading is neither authorized by our General Rules of Practice nor fair to the other parties. Moreover, the requested action would result in different standards of profitability being applied to different carriers, without demonstrated necessity or justification. The request is without merit, and will be denied.

It is ordered, That our order of June 28, 1977, in Investigation and Suspension Docket No. 9164 is clarified and corrected by the insertion of the words "and including" after the words "suspended to" in the next-to-last line of the first ordering paragraph.

It is further ordered, That the petitions for reconsideration and other requests for affirmative relief contained in the pleadings described in the appendix to this order are denied.

Decided September 20, 1977.

By the Commission.

H. G. Homme, Jr.
Acting Secretary

(Seal)

COMMISSIONER MURPHY, whom COMMISSIONERS STAFFORD AND MACFARLAND *join, dissenting in part:*

In light of circumstances presented on petition, including the reduction in the estimated volume of oil moving per day, I believe that respondents should be allowed an increase of 42 cents per barrel in the interim levels. The interests of parties in opposition are adequately protected by the refund provisions applying to the interim level of rates.

With respect to the request by some respondents that the suspension period be altered, it should be pointed out that the Commission can establish a shorter period where appropriate. As a matter of convenience, an identical expiration date of the suspension period, namely January 29, 1978, would be most appropriate, again giving due consideration to the fact that the parties in opposition are protected by other refund provisions.

I would deny the petitions in all other respects.

Appendix

Description of Petitions, Replies, and Other Pleadings which are the Subject of the Present Order

Filed:	Petitions
July 8	Petition of Exxon Pipeline Company for Reconsideration
July 22	Supplement to Petition of Exxon Pipeline Company for Reconsideration
July 25	Petition of the Bureau of Investigation and Enforcement for Reconsideration and Statutory Clarification of the Commission's Suspension Orders
July 25	Petition of ARCO Pipeline Company for Reconsideration
July 27	Petition of Union Alaska Pipeline Company for Administrative Review
July 27	Petition of Amerada Hess Pipeline Corporation for Reconsideration or Clarification
July 27	Petition of Mobil Alaska Pipeline Company for Reconsideration
July 28	Petition of Phillips Alaska Pipeline Corporation for Reconsideration and Revision
July 28	Petition of BP Pipelines Inc. for Reconsideration and for Permission to File a Revised Rate
July 28	Petition of the State of Alaska for Reconsideration
	Replies
July 18	Reply of the Arctic Slope Regional Corporation to the Petition of Exxon Pipeline Company for Reconsideration and to Application

	for the Stay of the Order Served June 28, 1977
July 19	Reply of the United States Department of Justice to the Petition of Exxon Pipeline Company for Reconsideration
July 28	Reply of the Bureau of Investigation and Enforcement to Petitions for Reconsideration filed by Exxon Pipeline Company and ARCO Pipeline Company
August 15	Joint Response to Petition of the Bureau of Investigation and Enforcement to extend the TAPS Suspension Periods
August 15	Joint Response to Petition of the State of Alaska for Reconsideration
August 16	Response of Sohio Pipeline Company to Petitions for Reconsideration
August 17	Consolidated Reply of the United States Department of Justice to Petitions of the Respondents for Reconsideration of the Commission's Orders of June 28, 1977 and July 18, 1977
July 28	Request for Stay of Suspension Order Dated July 19, 1977 (filed by Phillips Alaska Pipeline Corporation)
August 10	Opposition of the Bureau of Investigation and Enforcement to Phillip's Request for Stay of the I&S Order

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2412

BP PIPELINES INC., *Petitioner,*
v.
UNITED STATES OF AMERICA and the
INTERSTATE COMMERCE COMMISSION, *Respondents*

(FILED SEPTEMBER 8, 1977)

Petition For Review Of An Order Of The Interstate Commerce Commission

Before BROWN, Chief Judge, and RONEY, Circuit Judge*.

BY THE COURT:

BP Pipelines Inc. has petitioned for rehearing of our July 29, 1977 decision in Mobil Alaska Pipeline Co. v. United States, etc. [Nos. 77-2392, 77-2412, 77-2421 and 77-2437 at 5208]. We believe that the petition presents substantially nothing that the panel did not pass on in its prior decision. In view of the severe time problems involved in the operation of the Trans Alaska Pipeline and the parties' need to expedite Supreme Court review, the Court is of the opinion that nothing further would be accomplished by rehearing.

Therefore, to enable the parties to seek review before the Supreme Court without further delay, it is ordered that BP's Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12), the Petition for Rehearing En Banc is DENIED.

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* Judge Godbold, a member of the panel, being absent from the United States, did not participate in this Order.

APPENDIX E

(Service Date Jul 11 1977)

Order

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of July, 1977.

INVESTIGATION AND SUSPENSION DOCKET No. 9164

TRANS ALASKA PIPELINE SYSTEM
(Rate Filings)

No. 36611

TRANS ALASKA PIPELINE SYSTEM
(Rules and Regulations)

By Commission orders dated June 17, 1977 and June 28, 1977, investigations were instituted in the above matters. The carriers' initial rate tariffs were suspended without prejudice to the filing of interim rates. The order dated June 28, 1977 stated that the proceedings would be handled together because of the close interrelationship of the rate filings and the applicable rules and regulations.

Upon consideration of the record, we find that this matter should be referred to an Administrative Law Judge for hearing. We further find that due and timely execution of our functions under Section 15(7) imperatively requires the omission of an initial decision by the Administrative Law Judge.

It is ordered, That the above-entitled proceedings be referred to an Administrative Law Judge for hearing commencing with a pre-hearing conference on July 19, 1977,

at 9:30 a.m., Local Time, at the Office of the Interstate Commerce Commission, Washington, D. C.

In these proceedings the Commission intends to construe liberallythe discovery rules (Rules 56 through 67 [1] of the General Rules of Practice, 49 CFR 1100.56 through 1100.67). The Administrative Law Judge may find it necessary to establish special procedures and deadlines for discovery to permit the fullest possible development of the record in the public interest because of statutory time limits.

By the Commission. (Commissioner Hardin not participating)

H. G. Homme, Jr.
Acting Secretary

(Seal)

[1] Rules 54-65 of the Commission's Revised Rules of Practice, which are scheduled to become effective July 19, 1977.

APPENDIX F

STATUTORY APPENDIX

Interstate Commerce Act

§ 1. Regulation in general; car service; alteration of line Carriers subject to regulation

(1) The provisions of this chapter shall apply to common carriers engaged in—

• • •

(b) The transportation of oil or other commodity, except water and except natural or artificial gas, by pipe line, or party by pipe line and partly by railroad or by water—49 U.S.C. § 1(1)(b)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

• • •

Definitions.

(3) (a) The term "common carrier" as used in this chapter shall include all pipe-line companies; . . . 49 U.S.C. § 1(3)(a)(1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 1, 24 Stat. 379, *as amended by* Act of June 29, 1906, Ch. 3591, § 1, 34 Stat. 584; Act of June 18, 1910, Ch. 309, § 7, 36 Stat. 544; Act of Feb. 28, 1920, Ch. 91, § 400, 41 Stat. 474; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 2 (a), (b), 54 Stat. 899).

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§ 8. Liability in damages to persons injured by violation of law

In case any common carrier subject to the provisions of this chapter shall do, cause to be done, or permit to be done any act, matter, or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this chapter required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this chapter, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case. 49 U.S.C. § 8 (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 8, 24 Stat. 332; *as amended by* Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543).

• • •

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

Commission empowered to determine and prescribe rates, classifications, etc.

(1) Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly

discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation of practice so prescribed. 49 U.S.C. § 15(1) (1976) (originally enacted as Interstate Commerce Act of 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *as amended by* Act of June 29, 1906, Ch. 3591, § 4, 34 Stat. 589; Act of June 18, 1910, Ch. 309, § 12, 36 Stat. 551; Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of June 19, 1934, Ch. 652, § 602(b), 48 Stat. 1102; Act of Aug. 9, 1935, Ch. 498, § 1, 49 Stat. 543; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(a), 54 Stat. 911).

• • •

Commission to determine lawfulness of new rates; suspension; refunds; nonapplicability to common carriers by railroad subject to chapter.

(7) Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have and it is given, authority, either upon complaint or upon its own

initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the

Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible. This paragraph shall not apply to common carriers by railroad subject to this chapter. 49 U.S.C. § 15(7) (1976) (originally enacted as Mann-Elkins Act of 1910, Ch. 309, § 12, 36 Stat. 551, *amending* Act of Feb. 4, 1887, Ch. 104, pt. I, § 15, 24 Stat. 384, *and as amended by* Act of Feb. 28, 1920, Ch. 91, § 418, 41 Stat. 484; Act of Mar. 4, 1927, Ch. 510, § 2, 44 Stat. 1447; Act of Sept. 18, 1940, Ch. 722, Tit. I, § 10(c), 54 Stat. 912; Act of Feb. 5, 1976, Pub. L. No. 94-210, Tit. II, § 202(e)(1), 90 Stat. 36).

• • •

Federal Power Act

16 USC § 824d

§ 824d. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Com-

mission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint, at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision hereon, the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would

otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initialed after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commission may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

Natural Gas Act

15 USC § 717c

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the juris-

diction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Comimssion, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the

Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub. L. 87-454, 76 Stat. 72.